SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 181

WILLIAM L. CHESBROUGH AND MILDRED J. CHESBROUGH,

Petitioners,

vs.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY AND W. LEE SHIELD, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF.

SOL GOODMAN,
Counsel for Petitioners.

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THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY AND W. LEE SHIELD, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petition of William L. Chesbrough and Mildred J. Chesbrough, Petitioners herein, for and on behalf of themselves and all other policyholders of the respondent corporation, respectfully shows to this Honorable Court:

A

Summary Statement of the Matters Involved

Petitioners, William L. Chesbrough and Mildred J. Chesbrough, were the holders of five (5) policies of insurance.

The insurance company is a stock life insurance company with total assets of $331,000,000.00, having a capital of $30,000,000.00 and a surplus of $22,500,000.00. Its policies of life insurance have been issued to approximately two and two-thirds million policyholders of which number two million are policies of a face value of less than $1,000.00.

The Legislature of Ohio enacted Sections 9364-1 et seq. of the General Code of Ohio, relating the process by which an Ohio stock life insurance company may acquire its outstanding stock and become a mutual company. These sections provided for a vote by policyholders insured in at least $1,000.00 and whose insurance has been in force at least one year. A majority vote of such class to determine the question of mutualization as well as the control of the mutualized company after mutualization.

A plan of mutualization has been proposed whereby the stockholders of the corporation are paid $42,000,000.00 for their stock and the corporation becomes a mutual life insurance company. Notice of the meeting to vote on the plan was sent to all policyholders having voting rights, as defined by the statute which, in this case, constituted 14% of the policyholders and a majority of them have approved the plan and adopted a code of regulations. This change from a stock company to a mutual company was carried out, as permitted by the Ohio Statutes, upon a vote of a majority of 14% of the policyholders, and a code of regulations regulating the affairs of the company provide for its management in the future by a majority of this 14% group.

B

Reasons Relied Upon for the Allowance of the Writ

1. The decision of the Supreme Court of Ohio, affirming the decision of the Court of Appeals of Ohio, decided a federal question of substance not theretofore determined

by this Court and has decided it in a way probably not in accord with applicable decisions of this Court.

2. The decision of the state court is in violation of the rights of petitioners and the class of policyholders they represent, as guaranteed under Article (1), Section 19, and Article (2), Section 28, of the Constitution of the State of Ohio, and Section 10, Article (1), and Section 1, of the 14th Amendment to the Constitution of the United States of America.

3. The decision of the state courts involved a construction of Sections 9364-1 and 9264-8 of the General Code of Ohio and the construction placed on said sections of the Code, in their application to the facts herein, result in the impairment of the obligation of the contract between the policyholders and the company and amounts to the taking of property without due process of law, in violation of the constitutional provisions above mentioned.

4. Unless a decision is made by this Honorable Court upon the state of facts existing in the present cause, the petitioners and some two million other policyholders of respondent corporation will be deprived of their rights and assets in the corporation and will have their policies and contracts impaired by the depletion of reserves and the taking out of $42,000,000.00 of corporate funds by the stockholders.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio commanding that Court to certify and to send to this Court for its review and determination, on a day therein named, and a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket No. 31386, William L. Chesbrough and Mildred J. Ches-

brough, plaintiffs-appellants, vs. The Western and Southern Life Insurance Company and W. Lee Shield, Superintendent of Insurance of the State of Ohio, defendants-appellees, and that the said judgment of the Supreme Court of Ohio, entered by it on April 29, 1948, wherein it refused a motion to certify the record to the Court for review and dismissed the petition, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

William L. Chesbrough and
Mildred J. Chesbrough,
Petitioners.

Sol Goodman,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY AND W. LEE SHIELD, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the Supreme Court of Ohio is reported in *149 O. S. 578.* The opinion of the Court of Appeals for the Second Appellate Judicial District was rendered January 23, 1948, and is reported *51 O. L. Abstract 320.* A copy is set forth at page 25 *ante.* The opinion of the Common Please Court was rendered on January 1, 1947 and is not reported. A copy is set forth at page 26 *ante.*

II

Jurisdiction

1. The jurisdiction of this Court to entertain a petition for a writ of certiorari and the allowance thereof is provided for in Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Statutes 937, particularly Section 237 (a) (b).

2. The date of the judgment and decree to be reviewed is April 28, 1948, at which time the Supreme Court of Ohio rendered its decision in cause No. 31386, wherein it decided that petitioners' appeal be dismissed for the reason that no debatable constitutional question is involved.

3. The ruling of the lower court affirmed by the Court of Appeals and the Supreme Court of Ohio has, in effect, held that the defendant may pay out $42,000,000.00 to its stockholders to acquire all of the stock and become a company owned by the policyholders by the vote of a very small number of the policyholders in favor of such action and that, thereafter, the control, management and operation of the company can be carried on by the vote of a small number (a little over 7%) of the policyholders. The decisions of the Ohio courts, in this case, are in direct violation of the guarantys contained in Article 1, Section 19, and Article 2, Section 28, of the Ohio Constitution, and Section 10, Article 1, and Section 1, of the 14th Amendment to the Constitution of the United States of America.

There are no decisions by this Court covering a similar state of facts. However, the decision of this Court, in the case of *Massachusetts* v. *Mellon,* 262 U. S. 447, and *Stark, et al.* v. *Wickard, Secretary of Agriculture,* 321 U. S. 288, seem applicable, but the Ohio courts did not follow their reasoning or holding.

4. The jurisdiction of this Court is sustained by Rule 38, Section 5(a). See, also *Matthews* v. *Huwe*, 269 U. S. 262; *Cuyahoga River Co.* v. *Northern Realty Co.*, 244 U. S. 300; *Eau Claire National Bank* v. *Jackman*, 204 U. S. 522.

III

Statement of the Case

In this case approximately 2,600,000 individuals purchased contracts of life insurance with the respondent company. The Legislature of Ohio enacted legislation consisting of G.C.O. 9364-1 and 9364-8, providing that a stock life insurance company could convert into a mutual life insurance company, upon majority vote of policyholders having policies over one year old and over $1,000.00 face value. The mutualized company is to be controlled and carried on by majority vote of the same described policyholders. The Legislature apparently overlooked respondent company which has engaged in the sale of small policies of insurance, so that 86% of its policies failed to qualify for voting rights under this statute, thus, leaving the vote on the question of conversion, as well as the vote on the future management and operation of the company, in the hands of a majority of the remaining 14%. Under this legislation sustained by the Ohio courts, out of 100% of policyholders in a converted company, the question of conversion and future management of the company will depend upon a vote of a little over 7%.

IV

Specification of Errors

1. The Ohio courts committed error in finding and holding that the statutes in question were constitutional and that their operation as applied to the state of facts existing

in the instant case did not interfere with the constitutional rights of petitioners.

2. The Ohio courts committed error in holding that the rights and properties of petitioners and the other policyholders could be taken away under and by reason of G.C.O. 9364-1 and 9364-8.

3. The Ohio courts committed error in failing and refusing to declare the rights of petitioners to be such that the respondent company could not be converted from a stock life insurance company to a mutual life insurance company, except upon vote by a majority of its policyholders and the management of the mutual life insurance company after conversion put in the hands of a majority of the policyholders.

V

Argument

A mutual life insurance company has been defined as one which has no capital stock and whose policyholders constitute its members, who, in turn, elect its board of directors, through whom its business is conducted. *Atlantic Life Insurance Company* v. *Mancure*, 35 Federal (2nd) 360. Another judicial statement says that a mutual insurance company is simply a company whose funds for the payment of losses consist not of capital subscribed or furnished by outside parties, but of premiums mutually contributed by the parties insured. *Mygatt* v. *New York Protection Insurance Company*, 21 New York 52. *Muller* v. *State Life Insurance Company*, 27 Indiana Appeals 45. In the case of *Equitable Life Assurance Society of the United States* v. *Bowers*, 87 Federal (2d) 687, it was stated that an insurance company is mutual when there is no group but policyholders who have an interest in it or power over it. We see, therefore, that a mutual insurance company is one

entirely devoid of stockholders and the funds contributed by them as capital. In place of stockholders each policyholder is a member of the corporation and they elect the board of directors through whom the corporate business is conducted. No person, or group of persons, other than the policyholders has any interest or responsibility in connection with the corporation.

Accordingly, therefore, upon the conversion of a stock company to a mutual company all of the funds making up the corporation's capitalization, together with so much of the funds of the surplus account as may be determined upon, are withdrawn from the corporation and paid to the stockholders for their stock. Thereupon all of the policyholders become members of the corporation and responsible for the future conduct of the affairs of the corporation through directors elected by them. In other words, the insured become the insurer.

That mutualization would affect policyholders of a life insurance company and their rights, status and legal relations was clearly recognized by the legislature when it made mutualization contingent upon the approval of the policyholders. G. C. Section 9364-1 provides that a domestic stock life insurance corporation may become a mutual life insurance corporation and to that end may carry out a plan for the acquisition of shares of its capital stock provided that such a plan "(1) shall have been adopted by a vote of a majority of the directors of such corporation; (2) shall have been approved by a vote of stockholders representing a majority of the capital stock then outstanding at a meeting of stockholders called for the purpose; (3) *shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting;* * * *

(4) shall have been submitted to the superintendent of insurance and shall have been approved by him in writing;" (Emphasis added).

Following the above provision that such plan of mutualization shall be approved by a majority of the policyholders voting at a meeting called for that purpose the legislature has gone to great lengths in said code section to provide in detail just who shall be considered a "policyholder," what shall constitute insurance in the amount of $1,000.00 or more, the method of calling such meeting, the manner of voting, the type of ballot to be used, the procedure of said meeting, the appointment of inspectors, the verification of ballots, the determination of the qualifications of the voters, the counting of the votes and the payment of the expense of said meeting. Obviously the legislature was aware that some policyholders' rights, status and other legal relations would be vitally affected by mutualization else it would not have provided that mutualization could not be accomplished without their consent and approval, nor would the legislature have taken such pains to provide in detail the exact manner in which such consent and approval should be obtained. On the contrary, if the policyholders had no rights of any nature which would be affected by mutualization then the act would be invalid for making mutualization subject to the consent and approval of a totally disinterested group of persons having no connection whatsoever with the conversion.

The court below states that the plaintiffs may not invoke the jurisdiction of the courts for the reason that no actual controversy exists and plaintiffs have not sustained or are in imminent danger of sustaining any direct injury. In support of this finding two United States Supreme Court cases have been cited both of which are readily distinguishable from the case at bar. In the case of *Massachusetts* v. *Mellon*, 262 U. S. 447, the first case cited, the State of Massachusetts sought to enjoin an appropriation for the so-called

Maternity Act, which, after the first year, was to be apportioned among such of the several States as should accept and comply with its provisions, for the purpose of reducing maternal and infant mortality and protecting the health of mothers and infants. The State of Massachusetts had not even accepted the option extended by the Federal Government but that State claimed that, although it had not accepted the act, its constitutional rights were infringed by the imposition upon the State of an unconstitutional obligation. The court, at page 480 of its opinion stated:

> "Probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject."

And, at page 483 of the opinion the Court states:

> "In the last analysis the complaint of the complainant State is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, although nothing has been done and nothing is to be done without their consent; and it is plain that the question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power."

In the first place it is to be noted that this was an action for injunctive relief, and not for a declaratory judgment. Certainly it cannot be claimed that all of the elements necessary for injunctive relief must be present in order to maintain an action for declaratory judgment. If such were the case, the passage of the Uniform Declaratory Judgment Act would have been a vain and useless gesture. In the second place enactment of the statute did not in any way affect the plaintiff State's rights and could not affect them in any way unless the state gave its express consent. Ob-

viously, the question presented was moot because there was no action pending or contemplated which could affect the state in any way, shape or form.

In the case of *Stark, et al.*, v. *Wickard, Secretary of Agriculture*, 321 U. S. 288, which is relied upon by the court below, the relief sought was not to declare a statute unconstitutional but to compel proper execution of the Agricultural Adjustment Act by enjoining the Secretary of Agriculture from enforcing an order allegedly illegal under the act. The action was purely and simply in equity only, and grew out of an order of the Secretary of Agriculture reducing the minimum prices to be paid by milk handlers to milk producers on milk sold in certain areas. The order was directed to milk handlers only and, of course, did not affect any milk producer unless he chose to sell to milk handlers within the given area. The Supreme Court held that even though a milk producer had the option of whether or not he would sell within the area would not deprive the milk producer of the right to challenge an illegal order if he should choose to sell within the area; and held further that such milk producer would have an interest not possessed by the people generally as would enable him to bring the suit in equity. Syllabus 8 of this case reads as follows:

> "Where a complainant has an interest personal to himself and not possessed by the people generally in the enforcement of laws, such interest may be adjudicated by the courts under their general powers."

We see, therefore, that the above case was one in equity for an injunction; that no constitutional question was raised, and that the relief sought was the enforcement of a valid law. However, even though the case was in equity for injunctive relief the court held that where the complainant has an interest not possessed by the people generally, such interest may be adjudicated by the Courts under their

general powers. Certainly it cannot be contended that the policyholders of the defendant company do not have interests which are not possessed by the people generally, and that their rights are no more affected by the mutualization than persons who are not policyholders of the company.

Thirteen states have enacted mutualization statutes which permit stock companies to convert to mutual companies. In every single instance mutualization is contingent upon the approval of the policyholders. All of the legislatures, without exception, have thus recognized the paramount right of the policyholders to have an opportunity to give their consent to becoming members of a mutual company and the right to vote after mutualization.

The plaintiffs desire to direct the Court's attention to the extent to which the States of New Jersey and Oregon have gone not only in recognizing the policyholders' rights to vote for or against a plan of mutualization but also to insure that those rights will be fully and adequately safeguarded. Chapter 17: 33-46 of the New Jersey Statutes provides that before mutualization can take place a petition must be filed with the Chancery Court and thereupon the Court appoints counsel to represent the policyholders in the action where full inquiry is made into the fairness and propriety of the plan. After the Court renders its decision any policyholder can appeal to higher courts. This provision is in addition to the right of every policyholder over twenty-one years of age, whose insurance had been in effect for a year, to vote for or against the mutualization.* The Oregon statute, after providing that the question of mutualization must be submitted to the policyholders, further

* The Prudential Insurance Company, a New Jersey corporation, the second largest insurance company in the world mutualized under the New Jersey Statute which imposes no limitation on voting rights on the basis of amount of insurance held. (132 New Jersey, 170).

provides that if the plan of mutualization is rejected by the policyholders no further action towards mutualization can be taken for at least five years. Section 101-603, Vol. 7, Oregon Code reads as follows:

> "Prerequisites to Acceptance. Any such corporation hereinafter formed may carry out a plan for the acquisition of the shares of its capital stock for the purposes aforesaid; provided, however that such plan shall have been adopted and approved as herein set forth, to-wit * * * (d) such plan shall have been approved by a majority vote of the policyholders of such corporation, whose insurance shall then be in force, voting at a meeting."

Section 101-607, Volume 7, Oregon Code reads as follows:

> "Effect of Rejection of Proposal By Policyholders. In the event a majority of the policyholders of such corporation, whose insurance shall be in force, shall be for the rejection of such change, then, and in that event, such corporation shall continue as originally organized and no further vote or action shall be taken to effectuate such changes for a period of five years from the date of certificate of the Judges so declaring said vote."

Surely, the legislatures of Oregon and New Jersey would not have enacted such provisions into their mutualization statutes if the policyholders had no rights which would be affected by mutualization.

Mutualization under the plan in this case permits the withdrawal of capital and surplus by the stockholders and provides for the cancellation of all outstanding stock. When this is done the stockholders have no further legal interest in the company. The only other interested group is the policyholders. In other words the plan results in a sale of the company by the stockholders to the policyholders and the future destiny of the company is their sole concern. Can they be denied the right to question the desirability

of a sale to them or to challenge the constitutionality of enabling legislation? Are they to be denied the right to question procedures for the adoption of amended articles and regulations governing the mutualized company, incorporated in the plan?

In view of the above it is submitted that the operation of the mutualization statute clearly affects the rights, status, and other legal relations of the plaintiffs and other policyholders and that the Court below erred in finding that they have no right to maintain this action under the Uniform Declaratory Judgments Act.

It is the contention of the appellants that G. C. Sections 9364-1 and G. C. 9364-8 are invalid and unconstitutional in that they are discriminatory and deny appellants and other policyholders equal protection of the laws. It must be remembered that no person or group of persons, other than the policyholders, has any interest or responsibility in the mutualized corporation.

G. C. Section 9364-1 provides that the only policyholders who shall be entitled to vote on the approval or disapproval of a plan of mutualization shall be those policyholders who are insured in an amount of at least $1,000.00 and whose insurance shall at the time the vote is taken have been in force for at least one year. Let us examine the effect of this provision in the light of the admitted facts in the instant case. Out of a total of approximately 2,670,000 policyholders of the defendant corporation 2,000,000 policyholders, or seventy-five per cent of the total number of policyholders of the corporation were denied the right of vote for the approval or disapproval of the plan of mutualization. Of the total number of policies which the defendant corporation had outstanding eighty-six per cent, or 3,130,007 policies, were for amounts of less than $1,000.00 and only fourteen per cent, or 553,267 policies, were for amounts

of $1,000.00 or more; that of the total premiums received by the defendant corporation on policies in effect on January 30th, 1946, and still in effect on January 30th, 1947, and hence eligible to vote notwithstanding the one year limitation, fifty-eight per cent of such premiums were paid by policyholders who were denied the right to vote by reason of the $1,000.00 limitation; that the policyholders who were denied the right to vote held more than fifty percent of the total insurance which the defendant company then had in force and effect. The policyholders who under the terms of the plan and the mutualization act must become members of the company are bound by its future fortunes whatever they may be despite the fact that they were not only denied the right to express approval or disapproval of the plan but were also denied the right even to be apprised of the fact that the company was planning to mutualize and excluded from any opportunity whatsoever to see or examine the plan or in any other way to know anything about it.

What is of the utmost importance and the thing that affects these plaintiffs and every other policyholder of the company is that the vast majority of the policyholders, whose vote would be decisive on any question the subject of a policyholders' meeting, are denied the right to vote.

The Court below attempts to answer this complaint by stating that one of the named plaintiffs is already entitled to vote and the other will soon be accorded the right.

Section 9364-8 provides that all policyholders shall be members of the corporation but that the only policyholders who shall have the right to vote, or any voice in the business of the corporation, shall be those insured in an amount of at least $1,000.00 whose insurance shall have been in force for at least one year. The effect of this is to deprive seventy-five percent (75%) of the members holding eighty-

six per cent (86%) of the policies, having a total face value of more than fifty per cent (50%) of the insurance in force and paying fifty-eight per cent (58%) of the total premium income of the company, of any voice whatsoever in the manner in which the corporation business is conducted, even though the same might be conducted in a manner extremely detrimental to their interests and the interests of the corporation. By the same token, twenty-five per cent (25%) of the members holding fourteen per cent (14%) of the policies, having a face value of less than fifty per cent of the insurance in force and paying only forty-two per cent (42%) of the total premiums, are invested with the power to control the company in perpetuity. Under this state of affairs the small minority group has the power to amend the articles of incorporation, and corporate code of regulations, and to elect the directors, to the total exclusion of the members who have the overwhelmingly greater interest in the company and its well being. As stated above in a mutual company the funds for payment of losses consist not of capital subscribed or furnished by outside parties but of premiums mutually contributed by the parties insured. So in the instant case fifty-eight per cent (58%) of the premiums making up the fund from which losses on future policies are paid will be contributed to the company by seventy-five per cent (75%) of the members who, under the statute and plan, will be deprived of the right to utter one single word with respect to the manner in which the business of the company is conducted, including the payment of dividends, if any, even though the business might be conducted in a manner detrimental to their interests.

It is a general and unanimously accepted rule that any statute may be unconstitutional in its operative effect even though constitutional on its face.

This rule of law was announced in the case of *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, where the Court stated in its opinion:

> "A statute may be invalid as applied to one set of facts, and yet valid as applied to another."

The same rule was also recognized in the case of *Castle* v. *Mason*, 91 O. S. p. 296, where Syllabus 1 states:

> "The constitutionality of a law may be determined by its operative effect, although on its face it may be apparently valid."

And at page 303 of the opinion it is stated:

> "A law may be within the pale of constitutional authority when originally passed, yet because of its future operations it may directly contravene the organic law.
>
> "As stated by Mr. Justice Harlan, in Minnesota v. Barber, 136 U. S., 313, 319, 'There may be no purpose upon the part of the legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the form of law, may, by its necessary operation be destructive of rights granted or secured by the constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' To the same effect are Brimmer v. Rebman, 138 U. S. 78 and Poindexter v. Greenhow, Treas., 114 U. S. 270."

American social, political and economic philosophy has been based upon general principles of equality since the beginning of American government. The guaranty of equality is to be found in the clause in the Fourteenth Amendment to the Federal Constitution which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Cases too innumerable to cite have enunciated the meaning of the phrase "equal protection of the laws," and the protection afforded by it

against discriminatory legislation. In 12 American Jurisprudence, page 129, is the statement supported by a great many decisions of the United States Supreme Court that:

> "The guiding principle most often stated by the Courts is that this constitutional guaranty requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

It is common knowledge that a classification must have some relation to the privilege enjoyed and must be founded upon pertinent and real differences as distinguished from irrelevant and artificial ones. The test of generality of a law is that it should embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class. *Wauser* v. *Hoss,* 38 Atl. 449. One of the leading cases on the subject of classification is *Southern Railway Company* v. *Green,* 216 U. S. 400, wherein it is stated at page 417:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrary made without any substantial basis. Arbitrary selection, it has been said cannot be justified by calling it classification."

In the case of *Gulf, Colorado and Santa Fe Railroad Co.* v. *Ellis,* 165 U. S. 150, Justice Brewer states;

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just

and proper relation to the attempted classification and is not a mere arbitrary selection."

The above language was quoted and approved in 170 U. S. 294.

In 12 American Jurisprudence, page 144, it is stated:

> "A fundamental principle involved in classification is that it must meet the requirement that a law should affect alike all persons in the same class and under similar conditions."

And, at page 176 it is stated:

> "In order for a classification to meet the requirements of constitutionality it must include or embrace all persons who naturally belong to the class."

In 12 American Jurisprudence, page 140 it is stated:

> "Class legislation discriminating against some and favoring others is what is prohibited by the equal protection clause of the 14th Amendment to the Constitution."

And, at 12 American Jurisprudence, page 150, it stated:

> "The rule is well settled that arbitrary selection can never be justified by calling it classification. This is forbidden by the equal protection demanded by the 14th Amendment."

And, at page 151, it is stated:

> "The general rule is well settled by unanimity of the authorities that a classification to be valid must rest upon material differences between the persons included in it and those excluded, and, furthermore, must be based upon substantial distinctions. As the rule has sometimes been stated, the classification, in order to avoid the constitutional prohibition must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones."

It is the contention of the petitioners that the classification made by the legislature in the instant case in both G. C. 9364-1 and G. C. 9364-8, wherein policyholders insured in an amount of less than $1,000.00 are deprived of the right to know of or vote upon a plan of mutualization and are denied the right to participate in any manner in the affairs of the company even though they are members thereof, is an arbitrary and unreasonable classification and not one resting upon material differences between the persons included in the class and those excluded from the class and is not one based upon any substantial distinctions.

If the company had issued no policies of $1,000.00 or more to any person, not a single policy holder would be entitled to vote. Would the statute be upheld under these circumstances? We submit it is no more unreasonable to exclude all policyholders than it is to deny eighty-six per cent (86%).

The petition herein should be granted and reviewed by this court on authority of *Connecticut Mutual Life Insurance* v. *Moore,* 92 Supreme Court L. Ed. 647:

> "Consequently a case or controversy arising from a statute interpreted by the state court is here with precise federal constitutional questions as to policies issued for delivery in New York upon the lives of persons then resident therein where the insured continues to be a resident and the beneficiary is a resident at the maturity of the policy. A judgment on that class of policies should be reviewed by this Court. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 259, 77 L ed 730, 733, 53 S Ct 345, 87 ALR 1191; *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 79 L ed 949, 55 S Ct 486. See *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 459-463, 89 L ed 1725, 1733-1736, 65 S Ct 1384.

Summary of the Argument

The legislature authorized mutualization only upon approval by a majority of the policyholders. Does such authorization apply, in the instant case, where the qualification of policy holders to vote on mutualization eliminates 86% of the class? It must be evident that the legislature did not have such situations in mind, and if it did consider such situations, the application of the rule to this company is certainly contrary to every constitutional provision providing for equal treatment.

The respondents recognize the weakness inherent in this legislation when applied to the existing state of facts. The insurance company contends that after mutualization, all policy holders are entitled to vote. It contends that the statute provides for just what the petitioners contend it should provide. Section 9364-1, providing for a vote for mutualization, and Section 9364-8, providing for a vote after mutualization, use the same language in defining the class of policy holders eligible to vote as "policy holders insured in at least $1,000 * * * and whose insurance * * * has been in force for at least one year". The insurance company now contends that the language in the first section limits the qualification to vote to policies of $1,000, one year or more old, while the provision in Section 9364-8, using the same language, means that all policy holders, no matter what amount or of what age, may vote. No matter how hard one tries to stretch his imagination, such a construction is simply impossible. The fact that the insurance company did not so construe it is evident when, in its plan for mutualization, as well as in its action after mutualization, by adoption of a code of regulations, preparation of proxies, holding of the meeting and all other steps, it limited such action to policies of more than $1,000 and to an age of more than one year. Of course, if the Act, in Section 9364-8,

does require that all policy holders be given the right to vote, then this Court should grant petitioners relief, because the admitted facts are that notices were sent only to 14% of its policy holders and only that small percentage participated in the voting.

We respectfully submit that petitioners in this case, as holders of policies both over and under $1,000 and policies which are over and under one year old, are representatives of the entire class of policy holders and appear in this case as such representatives and *should be heard to voice the objection of the over two million policy holders in this company who have been deprived of an opportunity of either voting for mutualization or of voting for the adoption of a code of regulations to be effective after mutualization;* the judgment of the lower court should be reversed and, upon the agreed statement of facts, the petitioners should be awarded the relief prayed for.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that, (a) an important question of general law having been decided in a way probably untenable and in conflict with the weight of authorities; and (b) an important question of Federal law which has not been, but should be, settled by this Court; and (c) the State Court having decided a Federal question in a way probably in conflict with applicable decisions of this Court; it may be properly reviewed and that to such an end a writ of cer-

tiorari should be granted and this Court should review the decision of the Supreme Court of Ohio and finally reverse it.

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APPENDIX "A"

COURT OF APPEALS

No. 4071

William L. Chesbrough, and Mildred J. Chesbrough, *Plaintiffs-Appellants,*

vs.

The Western & Southern Life Insurance Co., and W. Lee Shield, Superintendent of Insurance, of the State of Ohio, *Defendants-Appellees*

Opinion

(Rendered on the 23rd day of January, 1948)

By the Court:

This is a law appeal from the Court of Common Pleas of Franklin County, Ohio. The action was one for a declaratory judgment seeking to be declared as invalid and unconstitutional Sections 9364-1 and 9364-8 of the General Code of Ohio. The trial Court, in a lengthy and well considered opinion, after setting forth the facts admitted by the pleadings, found that these facts were not sufficient to entitle the plaintiffs to invoke the jurisdiction of the Common Pleas Court to determine the constitutionality of these statutes. However, in view of the importance of the questions raised, it deemed it proper to consider the claims of the plaintiffs as to the unconstitutionality of the aforesaid sections, and after so doing it declared them to be constitutional. The assignments of error are all directed to these rulings by the trial Court. For this Court to write an extended opinion would serve no good purpose as we find the authorities for the rulings are fully set forth in the opinion of Judge Gessaman, which we adopt in its entirety as that of our own.

We find no error in the record and the judgment is affirmed.

Wiseman, P. J., Miller and Hornbeck, JJ., concur.

APPEARANCES:

Messrs. Cowan, Adams & Tyler, 42 E. Gay St., Columbus 15, Ohio, *Attorneys for Plaintiffs-Appellants.*

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Messrs. Vorys, Sater, Seymour & Pease, 52 Gay St., Columbus, O.

Mr. Roy L. Struble, 1204 Traction Bldg., Cincinnati, Ohio, *Attorneys for Defendant-Appellee,* The Western & Southern Life Insurance Co.

Hon. Hugh S. Jenkins, Attorney General; Hon. Ralph H. Klapp, Asst. Attorney General, State House Annex, Columbus 15, Ohio, *Attorneys for Defendant-Appellee,* Superintendent of Insurance of the State of Ohio.

APPENDIX "B"

COURT OF COMMON PLEAS

No. 171,787

WILLIAM L. CHESBROUGH, annd MILDRED J. CHESBROUGH, *Plaintiffs,*

vs.

THE WESTERN & SOUTHERN LIFE INSURANCE CO., and W. LEE SHIELD, Superintendent of Insurance, of the State of Ohio, *Defendants*

Decision

(Rendered on the 1st day of July, 1947)

GESSAMAN, *J.:*

This is an action for a declaratory judgment, presented to the Court upon the fourth amended petition and the separate answers of the defendants. Plaintiffs allege that

they bring the action upon their own behalf as policyholders of defendant company and on behalf of the company and all policyholders. The issues will be understood by a brief review of the fourth amended petition (hereinafter referred to as the "petition").

Plaintiff, William L. Chesbrough, alleges that he purchased a policy of life insurance from the defendant company on February 2, 1942, in the amount of $500.00 and one on July 16, 1946 in the amount of $5325.00.

Plaintiff, Mildred J. Chesbrough alleges that she purchased a policy of life insurance from the defendant company on December 22, 1941, in the amount of $500.00; one on December 13, 1943, in the amount of $284.00 and one on February 1, 1944, in the amount of $1000.00.

Plaintiffs further allege that on October 8, 1946, the directors of defendant company adopted a plan of mutualization whereby defendant company would be converted from a domestic stock life insurance company to a mutual life insurance company without capital stock; that by this plan defendant company would acquire all of its outstanding stock ($30,000,000.00) in exchange for United States bonds of the par value of $39,960,000.00; that each policyholder shall become a member of the corporation; that said plan was approved by the stockholders of the company on October 8, 1946; that a meeting of those policyholders specified in Sec. 9364-1, G. C., was held on January 30, 1947, and that, by vote held in the manner specified in said section the plan was approved; that said plan will be submitted to the Superintendent of Insurance for his approval or disapproval.

Plaintiffs further allege that 86% of the outstanding policies of the company were for amounts less than $1000.00; that this amount represents 75% of the policyholders, all of whom had no right to vote by virtue of the provisions of Sec. 9364-1, G. C. Plaintiffs then allege that Sec. 9364-1, G. C. denies to the policyholders of defendant company "equal protection of the laws and is discriminatory in contravention of the Constitution of the United States of America and the State of Ohio" in four respects, namely; (1) In that it "grants the right to vote on a plan

of mutualization only to those policyholders insured in an amount of at least $1000.00, and whose policy at the time of the policyholders' meeting, shall have been in effect for at least one year"; (2) In that it grants to such policyholders only one vote regardless of the number of policies owned or held; (3) In that it denies the right to vote to a large number of policyholders (those not qualifying as above set forth); and (4) In that it denies the right to vote to policyholders whose policies have been in effect for less than one year.

In substantially the same respects plaintiffs allege that Sec. 9364-8, G. C., denies to the policyholders the equal protection of the laws and is discriminatory in contravention of the Constitution of the United States of America and of the State of Ohio.

Plaintiffs then pray that the Court find that Sec. 9364-1, G. C., and Sec. 9364-8, G. C., be held to be invalid and unconstitutional and particularly in those respects above set forth.

The defendant company admits practically all of the allegations of the petition except the allegations that the action is brought on behalf of the company and all policyholders, and the allegations of unconstitutionality, all of which it denies.

Before proceeding to consider the points at issue, it should be pointed out that, of the four steps required by Sec. 9364-1, G. C., et seq. for mutualization, the first three have been taken and there is no question but that they have been taken according to law. The fourth step (action by the Superintendent of Insurance) yet remains.

The first issue upon which the parties disagree is the plaintiffs' right to invoke the jurisdiction of the Court to determine the constitutionality of the mutualization statutes. On this and other issues, counsel have submitted a large number of authorities. To review them all would only unduly extend this opinion. Therefore, we shall refer only to those which we feel are decisive of the issue under consideration.

Counsel for plaintiffs urge that the declaratory judgment act (Sec. 12102-1), G. C., et seq.) is broad enough to

permit such an action in a situation where "it is perfectly obvious that situations *might* well arise in connection with the conversion * * * wherein the liquidation of the capital and surplus accounts, together with other factors, would make it *undersirable* to the point that the policyholders would be overwhelmingly, or even unanimously, opposed to the mutualization which would ipso facto make them members of the corporation and responsible for the future conduct of the business." Brief of Plaintiffs, (p. 3). At no point, however, either in the petition or in plaintiffs' briefs, do we find any definite allegation or claim that plaintiffs have been or will be injured by the proposed plan in any particular respect.

It is well settled that the holder of a non-participating policy—such as those in this case—has no vested right in the organizational structure of the company.

> "The claim that Koplin has any vested right in the organizational structure of Ohio National cannot be sustained either in logic or by authority."
>
> (Citing *Ohio, ex rel. Nat'l. Life Assn.* v. *Mathews, Supt. of Ins.,* 58 O. S. 1.)
>
> *Belden* v. *Union Central Life Ins. Co.,* 143 O. S. 329.

See also *State, ex rel.* v. *Union Central Life Ins. Co.,* 13 O. C. C. (N.S.) 49.

It also seems well settled, both on reason and authority that,

> "To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."
>
> *Massachusetts* v. *Mellon* 262 U. S. 447, Syl. 5, and p. 488.

See also *Stark* v. *Wickard,* 321 U. S. 288 at p. 304.

> "This statute (Declaratory Judgment) is available only to those persons who have an 'actual controversy'.

Persons are not entitled to litigate questions which may never affect them to their disadvantage."

Driskill v. *Cincinnati,* 66 O. S. 372, at p. 374.

It is true that the General Assembly has directed, in Sec. 12102-12, G. C., that the declaratory judgment act shall be "liberally construed and administered," but it appears to be equally true that one may not challenge the constitutionality of a statute unless and until he has an "actual controversy" or "he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement." Since plaintiffs have no vested right in the organizational structure of defendant company, it is quite clear that there is, then, no allegation in the petition or even a claim in the briefs that plaintiffs have sustained or even that they are in imminent danger of sustaining some direct injury. The claim or argument that some "situations *might* arise" that "would make mutualization undesirable" certainly does not give rise to a right to invoke the jurisdiction of a court for a declaratory judgment.

Under the facts as alleged, it is the opinion of the Court, that the plaintiffs are not in position, nor do they have the right, to challenge the acts complained of or the constitutionality of the statutes in question.

II

In view of the importance of the questions raised, we deem it proper for the Court to proceed to consider the claims of plaintiffs as to the unconstitutionality of Sec. 9364-1, G. C., and Sec. 9364-8, G. C., first, as to Sec. 9364-1, G. C.

This section was first enacted by the General Assembly in 117 O. L. 608, and became effective August 23, 1937. It was amended, to take its present form, in 119 O. L. 70, effective July 17, 1941. All of the policies of insurance which plaintiffs allege that they hold, were purchased by them subsequent to July 17, 1941. Therefore, when they purchased the policies they were presumed to know that the General Assembly had authorized these changes in

corporate structure of defendant company, and in the methods set forth in the statute. Sec. 2, Art. XIII of the Ohio Constitution provides, in part, as follows:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. * * *"

As stated in *Belden* v. *Union Central Life Ins. Co., supra,* at pp. 341-2:

> "This provision of the Constitution was adopted on September 3, 1912, and affords full and complete authority to the General Assembly to provide by general laws for the formation of corporations and for changes in the organizations or structure of existing corporations.
>
> "This provision was in full force and effect when each of the appellants entered into his contract with his respective company and therefore he could have no vested right in the corporate structure of the company. He knew or is presumed to have known that the General Assembly had express constitutional authority to authorize a change in the organization or structure of any corporations formed under the laws of this state."

To which we add, that when plaintiffs purchased their polices, they knew or were presumed to know that the General Assembly *had* authorized the changes here complained of and in the manner here attacked; furthermore, that plaintiffs, by virtue of the constitutional and statutory provisions then in effect, had no vested right in the corporate structure of the defendant company. Therefore, this question must be approached with those principles in mind.

It must be remembered that plaintiffs do not allege that the proposed change has or will impair, in any respect, the obligations of any of their contracts of insurance. The questions are, merely, does Sec. 9364-1, G. C., deny to plaintiffs the equal protection of the laws or is it discriminatory in any of the respects heretofore set forth?

We must also keep in mind that it was also held in the *Belden* case, *supra,* at p. 348 (referring to Sec. 9364-1, G. C., et seq.):

> "From what has been said, it follows that the act is not unconstitutional and void upon its face."

And also that, (p. 349),

> "Where, as here, an attack is made upon an act which is valid on its face, upon the ground that, as applied to a given state of facts, it is invalid, the burden rests upon the party making such attack to present clear and convincing evidence of a presently existing state of facts, which make such act unconstitutional and void when applied thereto."

Plaintiffs' claim of unconstitutionality is based upon the fact that certain of the policyholders do not have the right to vote and that those who do, have only one vote regardless of the number of policies held. It will, of course, be conceded that there is nothing in either the Constitution, or in plaintiffs' contract which grants to them any right to a voice in the proposed change. The only voice given to a policyholder is that specified in Sec. 9364-1, G. C., and to those who can qualify thereunder. It is a voice voluntarily and gratuitously given, not one which the Legislature was required to give. How, then, can the fact that some were given the right and others not, violate any provision of either the United States or Ohio Constitutions? Counsel for plaintiffs have not referred to any specific section of either Constitution, and, boiled down, their claim is that the classification set forth in Sec. 9364-1, G. C., is unreasonable and discriminatory. Again, we ask, how can such legislative classification be discriminatory or deprive plaintiffs of the equal protection of the laws, when neither by Constitution or by contract did they have any voice in such matter? We think that it cannot be.

Many cases have been cited by counsel for both sides upon the question of what is and what is not a proper

classification. The law is well summarized in 12 Am. Jur. pp. 214-216, (Sec. 521, Constitutional Law):

Page 216:

> "All reasonable doubts must be resolved in favor of a classification made by the Legislature, and it is the duty of the Court to sustain it if any real distinction can be found."
>
> "The authorities cumulatively establish the rule that the assailant of a classification must clearly establish invalidity * * *."

The only facts before the Court are those admitted allegations of the petition to the effect that a certain percentage of the policyholders are not entitled to vote. Under the rule above set forth, that fact does not per se make statute unconstitutional or invalid. Various reasons, in argument, have been adduced for the classification as enacted, such as minimizing the cost of conducting the election, the saving of time, etc., but none of these need be considered. Based upon both reason and authority, the classification is not, per se, unconstitutional and no facts have been pleaded which prove it to be unconstitutional. Furthermore, we revert to our original conclusion, since plaintiffs did not either by Constitution or by contract, have a right to a vote in such matters, the granting of the right to some, as a gratuity, but not all, does not make the act unconstitutional in its operative effect.

It should here be observed that the approval of the policyholders who can qualify, is the third of four steps necessary for the change. The first is the approval of the board of directors, which has been done. The second is the approval of the stockholders, which has also been secured. The last is the approval of the Superintendent of Insurance, which has not yet been secured. But we call attention to these four steps to emphasize the fact that great precaution has been required by the General Assembly, and that finally, for the protection of all concerned, the Superintendent of Insurance may disapprove the plan or he may approve it if he finds that "the company is in such financial condition that the conversion may be consummated without loss or harm to

its creditors, its shareholders or *its policyholders*". (Belden case, supra, pp. 347-348.)

It is our opinion, therefore, that the classification set up in Sec. 9364-1 is not discriminatory and that it does not deny to plaintiffs the equal protection of the laws.

III

In considering the question that has been raised in connection with Sec. 9364-8, G. C., it is important to note that plaintiff, Mildred J. Chesbrough, is the holder of $1,000.00 policy of insurance purchased from the defendant company on February 1, 1944. Therefore, she is entitled to vote at a policyholders' meeting. The plaintiff, William L. Chesbrough, is the holder of a $5325.00 policy purchased from defendant company on July 16, 1946. Therefore, in only a few days he will be entitled to a vote. Therefore, for all practical purposes, there can be no dispute between the parties on this point. The first annual meeting is set for March 8, 1948, and it would hardly be possible to call a special meeting between now and July 16, 1947. As between the named parties there is no constitutional question to be decided and the question need not be decided. *State, ex rel. Clarke* v. *Cook, Auditor,* 103 O. S. 465; *Rucker* v. *State,* 119 O. S. 189, and *Wiggins* v. *Babbitt,* 130 O. S. 240. However, since plaintiffs allege that they bring this suit on behalf of all other policyholders, we add that for the reasons given under subdivision II of this opinion, it is our opinion that Sec. 9364-8, G. C., is not violative of either of the Constitutions as alleged.

It is the opinion of the Court, therefore, that the fourth amended petition be dismissed and judgment entered for the defendants.

Motion for new trial, if filed, may be overruled.

APPEARANCES:

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Messrs. Vorys, Sater, Seymour & Pease, 52 East Gay St., Columbus 15, Ohio, *Attorneys for Defendant*, The Western & Southern Life Ins. Co.

Hon. Hugh S. Jenkins, Attorney General, Hon. Ralph K. Klapp, Asst. Attorney General, State House Annex, Columbus 15, Ohio, *Attorneys for Defendant*, W. Lee Shield, Superintendent of Insurance of the State of Ohio.

APPENDIX "C"

Sec. 9364-1. Conversion of domestic stock life insurance corporation into a mutual life insurance corporation; plan; "policyholder" defined.

Any domestic stock life insurance corporation, duly incorporated under a general law, may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock, provided, however, that such plan: (1) shall have been adopted by a vote of a majority of the directors of such corporation; (2) shall have been approved by a vote of stockholders representing a majority of the capital stock then outstanding at a meeting of stockholders called for the purpose; (3) shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting; the term "policyholders" as used herein shall be deemed to mean the person insured under an individual policy of life insurance, and the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided: in the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract

declares two or more persons to be the owner, the persons insured or the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof; in case any such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall have been filed at the principal office of the corporation at least thirty days prior to the date of said meeting, then such assignee shall be deemed a policyholder within the meaning hereof; except as provided herein, an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof; the reference herein to insurance in the amount of $1000 or more shall be deemed to include any annuity contract, the commuted value of which is $1000 or more on the date of said meeting, and any pure endowment contract for the principal sum of $1000 or more; notice of such meeting shall be given by mailing such notice from the home office of such corporation at least thirty days prior to such meeting in a sealed envelope postage prepaid addressed to such policyholders at their last known post office addresses, provided, that personal delivery of such written notice to any policyholder evidenced by written receipt therefor may be in lieu of mailing the same, and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such mutualization plan; provided, however, that policyholders may vote in person, by proxy or by mail; that all votes shall be cast by ballot on a uniform ballot furnished by the corporation, and the superintendent of insurance shall supervise and direct the method and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the superintendent of insurance and to the corporation the result thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the superintendent of insurance; that all necessary expenses incurred by the superintendent of insurance shall be paid by the corporation as certified to by him; and (4)

shall have been submitted to the superintendent of insurance and shall have been approved by him in writing; provided that every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the superintendent, and provided that neither such plan, nor any such payment, shall be approved by the superintendent unless at the time of such approvals, respectively, the corporation, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, and in the case of any payment not fixed by such plan and subject to separate approval as aforesaid after the approval of such plan, after deducting also the amount of such payment, shall be possessed of assets sufficient to maintain its deposit theretofore made with the superintendent of insurance and not less than the entire liabilities of the corporation, including the net values of its outstanding contracts computed according to the standard adopted by the corporation under the provisions of section 636 of the General Code of Ohio, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated or paid under such plan.

Sec. 9364-8. Code of regulations; contents; alteration, etc., of code.

(a) The code of regulations of any such corporation shall provide that each policyholder of the corporation shall be a member of the corporation. The term policyholder as used herein shall be deemed to mean the person insured under an individual policy of life insurance, the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided. In the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons so declared to

be the owner shall be deemed one policyholder for the purpose hereof. In case any such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall be filed at the principal office of the corporation, then such assignee shall be deemed a policyholder within the meaning hereof, but for the purpose of determining voting rights such assignment shall not be effective until thirty days after it shall have been filed with the corporation. Except as provided herein an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof.

Such code of regulations shall provide that each policyholder insured in at least $1000.00, or holder of an annuity, which at normal date of maturity requires the payment of $100.00 or more annually, and whose insurance or contract of annuity shall then be in force and which has been in force for at least one year prior to a policyholders' meeting, shall be entitled to one vote only irrespective of the number of policies or contracts held by him or the amount thereof.

(b) The power to make, alter, amend or repeal the code of regulations shall be vested in the board of directors or trustees unless reserved to the members by the articles of incorporation.

(c) The code of regulations of a mutual legal reserve life insurance corporation shall provide that such corporation shall issue no policy of life insurance or annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance or annuity.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 181

WILLIAM L. CHESBROUGH AND MILDRED J. CHESBROUGH,

Petitioners,

vs.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY AND W. LEE SCHIELD, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO.

REPLY BRIEF OF PETITIONERS

Petitioners would not ordinarily burden the court with a reply brief, but some of the statements contained in respondents' brief are so improper and contrary to the facts that we feel it to be our duty to call those matters to the court's attention. At page 6 and 7 respondents make certain statements about things happening long after this case was tried. We have been suffering under the delusion that a reviewing court is somewhat committed to consider and decide cases upon the record before it. We are, therefore, at a disadvantage in getting into a controversy with respondents over these arguments which they make as to what

happened recently and long after the record was made up. We would not object strenuously to a departure, by respondents, from controlling rules if it were not for the fact that they seek to insinuate that mutualization is an accomplished fact. In other words, they would have your honors feel that you need not bother with deciding this case because they have already decided it for you. They, in effect, tell the court that they have taken $42,000,000.00 of policy holders' money and since they did that before the court had a chance to decide upon it that makes it an accomplished fact and can no longer be reviewed by a court. Somehow, we feel that this court will not be misled by such arguments.

At page 8 respondents state that the attack on Section 9364-8 is premature, anticipatory and frivolous. They further state that "the parties agree that each member of the mutualized corporation has a vote and the constitutional question is purely academic." The record discloses that following Section 9364-8, 86 per cent of the policies were excluded from the right to vote on a code of rules and regulations. The record shows that this code excludes 86 per cent of the policies from ever voting on anything in connection with this corporation. In the face of such a record, respondents must be very brazen to argue as they do, and to claim that they are going to give all policy holders a vote in the future when, as a matter of fact, the statute disfranchises 86 per cent, and the respondents have already adopted a code regulating the company in the future by a majority of 14 per cent, and in the code have *included a rule which forever, in the future, excludes 86 per cent of the policies from ever voting.*

The importance of giving policy holders the right to vote, the number or percentage of votes as compared to the number of policy holders, is shown in a table contained in the Investigation of Concentration of Economic Power, Monograph number 28 at page 16.

	Estimated number of policy-holders	Number of possible votes
1. Metropolitan	27,111,000	24,821,000
2. Prudential	21,300,000	12,200,000*
3. New York Life	2,000,000	1,850,000
4. Equitable	1,149,500	1,072,000
5. The Mutual of New York	865,000	805,000
6. Northwestern	635,000	635,000
7. John Hancock	5,170,000	5,250,000
8. Penn Mutual	367,674	1,651,678
9. Mutual Benefit	364,004	Not supplied
10. Massachusetts Mutual	363,696	486,000
11. New England Mutual	253,950	278,500
12. Provident Mutual	189,000	189,000
Western and Southern Life Insurance Company	2,700,000	700,000

* All policy holders under 21 years of age have no vote.

In connection with this investigation by the Temporary National Economic Committee in a study made under the auspices of the Securities and Exchange Commission, in which Justice Douglas, now a member of this court, participated, the president and chief stockholder of the respondent was giving testimony and at page 91, of the same booklet, the following is quoted: "Mr. Charles F. Williams, president of the Western & Southern, testified as follows:

'Mr. Gesell: Have you or any of the other principal officers or controlling stock holders had business relations with the company through outside affiliations of any sort?

'Mr. Williams: Never.

'Mr. Gesell: You have confined your business activities to the operation of the insurance company?

'Mr. Williams: That is right.

'Mr. Gesell: Is it your feeling that officers and directors should not deal with their own company, even when it is a stock company?

'Mr. Williams: I don't see how they can do it. No, of course not.

'Mr. Gesell: You think it is undesirable for that situation to exist?

'Mr. Williams: Yes, yes; it is even worse than undesirable.' "

It seems as though it makes a difference where the officers and stock holders can draw out $42,000,000.00. Then, apparently, it is perfectly proper for them to deal with themselves for their own advantage, and petitioners, representing 5 policies and claiming to represent all other policy holders, are opposed in their request for a review by the courts of such action, and are opposed when they ask a declaratory judgment seeking to have the rights of the policy holders determined in a judicial proceeding.

We respectfully submit that the brief of respondents is misleading, is based on misstatements of facts and statements of facts which are not in the record, and that a writ of certiorari should be issued in this case.

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INDEX.

Cases Cited.

Texts.

Constitution.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 181.

WILLIAM L. CHESBROUGH AND MILDRED J. CHESBROUGH,
Petitioners,

vs.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY AND W. LEE SHIELD, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO,
Respondents.

BRIEF ON BEHALF OF RESPONDENT THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY.

OPINIONS OF THE COURTS BELOW.

The opinion of the trial court, the Court of Common Pleas of Franklin county, Ohio, is not reported but is printed as Appendix B hereto.

The opinion of the Court of Appeals of Franklin county, Ohio, is reported in 51 O. L. Abstract at page 320 and is printed as Appendix A hereto.

The entry of the Ohio Supreme Court dismissing the appeal is reported in 149 O. S., 578. Its entry overruling the motion to certify is not reported. Both entries are printed at page 36 of the transcript of record herein.

JURISDICTION.

Jurisdiction is invoked under Section 237 of the Judicial Code as amended by the act of February 13, 1925, 43 Statutes, 937, (U. S. C., Title 28, Sect. 344), presumably on the ground that the action of the Supreme Court of Ohio drew in question the validity of Sections 9364-1 and 9364-8 of the General Code of Ohio on the ground of their being repugnant to the United States Constitution. We suggest that no such jurisdictional ground exists in this case.

Petitioners hold several non-participating policies issued by respondent, an Ohio stock life insurance corporation, at a time when the Ohio statutes (O. G. C. Section 9364-1 et seq., Appendix C) provided for the conversion of Ohio insurance companies from stock to mutual companies. These statutes prescribe the steps which must be taken in the course of such conversion, one of them being a vote of policyholders holding policies of $1,000 or more which have been in force for at least one year. Petitioners sought to invoke the jurisdiction of the state courts under the Ohio Uniform Declaratory Judgments Act (Appendix D) which requires that the legal relations of the parties seeking a declaration thereunder must be "affected" by the statute which is to be considered. Petitioners prayed for a judgment declaring unconstitutional the statute which prescribed the aforesaid restricted vote. The cause was submitted on the fourth amended petition and the answer without evidence.

The trial court found that the alleged facts were not sufficient to entitle petitioners to invoke the jurisdiction of the court to determine the constitutionality of the statute since the petitioners did not claim that they had been or would be injured by mutualization, had no vested rights in the capital or surplus of a stock life insurance company

and could not invoke the Ohio Uniform Declaratory Judgments Act in challenging the constitutionality of the statute unless they had an actual controversy and were in danger of sustaining some direct injury. (Appendix B.)

The conclusions of the trial court are well summarized by the appellate court's per curiam opinion in the following language:

> "The trial court, in a lengthy and well-considered opinion, after setting forth the facts admitted by the pleadings, found that these facts were not sufficient to entitle the plaintiffs to invoke the jurisdiction of the Common Pleas Court to determine the constitutionality of these statutes. However, in view of the importance of the questions raised, it deemed it proper to consider the claims of the plaintiffs as to the unconstitutionality of the aforesaid sections, and after doing so it declared them to be constitutional. The assignments of error are all directed to these rulings by the trial court." (Appendix A.)

The Supreme Court of Ohio declined to review. It overruled a motion to certify and dismissed the appeal. The petitioners now pray for a writ of certiorari to reverse "said judgment of the Supreme Court of Ohio, entered by it on April 29, 1948, wherein it refused a motion to certify the record to the court for review and dismissed the petition".

We submit that this court has no jurisdiction to review the Ohio Supreme Court's denial of the motion to certify the record (Second National Bank v. First National Bank, 242 U. S., 600; Stratton v. Stratton, 239 U. S., 55) and that, under the rule of Broad River Co. v. South Carolina, 281 U. S., 537, 540, (see also Demorest v. City Bank Co., 321 U. S., 36, 42) this court will not issue its writ to review the Ohio court's action in sustaining the motion to dismiss the appeal.

We do not contend against the rule that certiorari may be had when the validity of a state statute is drawn in

question on the ground of its being repugnant to the United States Constitution even though the Supreme Court of Ohio may have dismissed the appeal because it regarded the question as being frivolous. (Matthews v. Huwe, 269 U. S., 262, 265.) We maintain that the Ohio courts decided that they could not, under the Ohio law, take jurisdiction of this action for a declaratory judgment.

It is apparent that the lower courts found that they were without jurisdiction to entertain the suit under the provisions of the Ohio Uniform Declaratory Judgments Act. While the trial court, having concluded against this jurisdiction, went on to consider the questions raised by the petition, the trial court clearly stated that it had no jurisdiction to entertain the action. The appellate court was of the same opinion.

The Supreme Court of Ohio in dismissing the appeal used the same language which it has frequently used in disposing of frivolous constitutional questions, but the expression "no debatable constitutional question" is also applicable to a case in which no constitutional question is raised because the court has no jurisdiction to consider the question at the suit of the particular parties. The action of the Ohio Supreme Court must be viewed against the factual background of this case. Thus viewed, it is evident that the Supreme Court did not merely consider the constitutional question to be frivolous. It declined to consider the question at all because Ohio courts have no jurisdiction to consider such questions at the request of plaintiffs who pose a question which does not affect them. Such is a disposition of the case under local law on non-federal grounds which this court will not review.

Our conclusion respecting the nature of the action of the Ohio Supreme Court is a consistent one; but if we assume that all three Ohio courts first decided that they had no jurisdiction under the Ohio law to decide the constitutional

questions and then proceeded to decide them, the rule of Allen v. Arguimbau, 198 U. S., 149, is applicable. While the opinions of the two lower courts leave little doubt as to which of the two grounds the judgment was based upon, it cannot be debated that one ground was the lack of jurisdiction of the Ohio courts to entertain this action for a declaratory judgment which was an adequate ground for the judgment sought to be reviewed. In such cases this court will not take jurisdiction. (S. W. Bell Telephone Co. v. Oklahoma, 303 U. S., 206, 212; Lynch v. New York, 293 U. S., 52, 54; Tax Commission v. Wilbur, 304 U. S., 544.)

STATEMENT OF THE CASE.

The case is made from the allegations of the fourth amended petition and the answer. The Western and Southern is organized under the laws of Ohio as a stock life insurance company. It has never issued a participating policy or a policy which permits any policyholder to participate in its earnings or surplus or to vote or otherwise participate in any corporate action. (Record, page 21.)

In 1937 the Ohio General Assembly enacted a mutualization law to provide for the conversion of life insurance companies from stock to mutual companies. The only amendments to that law became effective July 17, 1941. Pertinent provisions of the law are printed as Appendix C hereto.

On December 22, 1941, and thereafter the petitioners procured policies of the Western and Southern.

The mutualization law prescribes the corporate legislation and procedure for the adoption of a plan of mutualization by a stock corporation and for the corporation's acquisition thereafter of its stock from its stockholders by gift, bequest or purchase. Only capital and surplus may

be used in making purchases. Under Ohio law the capital and surplus of a stock life insurance company issuing non-participating policies belongs to the stockholders and policyholders have no rights therein. (Ohio, ex rel. National Life Assn., v. Matthews, 58 O. S., 1; Belden v. Union Central Life Insurance Co., 143 O. S., 329.)

Section 9364-1 of the mutualization act prescribes four steps which must be taken prior to acquisition of the corporation's stock. The directors must adopt a plan. The plan must be approved by a majority of the stockholders. It must be approved by a majority of a representative group of policyholders voting at a meeting called for that purpose and held under the supervision of the Ohio superintendent of insurance. It must be finally approved by the superintendent who may not give his approval unless the plan is such that the corporation, after acquiring its stock, will be left with assets sufficient to maintain its statutory deposit ($100,000), all liabilities including net values of outstanding policy contracts computed according to law and all funds, contingent reserves and surplus, save so much of the latter as shall have been paid for acquiring the shares.

Section 9364-2 (b) provides that neither the retirement of stock nor the amendment of articles of incorporation upon mutualization shall affect existing contracts and Section 9364-8 forbids the mutualized corporation to make any assessment on a policyholder or member in addition to the regular premium.

The plan of mutualization adopted by the Western and Southern provided for the acquisition of its stock by the use of capital and a part of the surplus leaving with the mutualized company, as of December 31, 1946, $12,500,000 of the then total surplus of $22,460,000. As of May 31, 1948, this surplus of $12,500,000 after mutualization has increased to $19,060,570. The first two steps in the mu-

tualization process had been taken at the time this suit was brought on the eve of the policyholders' meeting which has since been held. A majority voted in favor of adopting the plan. The Ohio superintendent of insurance has now approved the plan and it has been consummated and the company has been mutualized.

Petitioners complain that Section 9364-1 restricts the meeting of policyholders to those holding insurance amounting to at least $1,000, whose policies have been in force for at least one year. They also say that, despite our conclusion to the contrary, Section 9364-8 must be construed as requiring the company to deprive them of a vote when the time comes for the annual meeting provided by Section 9364-3 after the company has been mutualized. They have no other complaint and make no other claims, raising merely the naked question of the constitutionality of these sections in the respects noted without allegation of damage to them or of any legal right of theirs which would be affected by the judgment. They do not claim that they have an interest in the capital or surplus, or that the plan impairs the company's ability to perform its contracts, or that the statutory provisions for the protection of creditors or of policyholders are insufficient, or that the company intends to depart from the plan of mutualization or that the superintendent of insurance will fail to perform his duty as enjoined by statute. The prayer for relief is confined to a request for attorneys' fees.

SUMMARY OF THE ARGUMENT.

Judicial power to disregard a statute as unconstitutional can be invoked only by one who has sustained or is in immediate danger of sustaining direct injury personal to the challenger. No such injury or threat thereof appears in the record.

Petitioners procured their policies after Sections 9364-1 and 9364-8 of the Ohio General Code had been enacted. These sections became a part of their policies and measure their rights and they and all other policyholders similarly situated have only such rights as these sections provide. All policyholders of an Ohio stock life insurance association issuing non-participating policies, whenever such policies were issued, have no personal right or interest in the capital and surplus of the corporation. Mutualization affects only the capital and surplus and organizational structure. The Ohio law expressly preserves without change policyholders' contractual rights under their policies. Policyholders have no constitutional right to maintenance of the organizational structure or to grant or withhold consent to an organizational change.

The Ohio legislature selected a representative group of policyholders whose vote on mutualization is a part of the proceedings for conversion from stock to mutual organization, along with the vote of directors and stockholders and the approval of the state superintendent of insurance. The voting qualifications did not confer a personal privilege or economic right but rather a function in the nature of a duty from the performance of which no personal advantage would arise and from the failure to perform which no liability could result. The qualifications for such duty are based upon probable interest and the classification is justified by considerations of economic and administrative necessity in the case of corporations with millions of policyholders.

The attack on Section 9364-8 is against provisions which were inherent parts of the original contract between petitioners and respondent. Moreover the attack is premature, anticipatory and frivolous. The parties agree that each member of the mutualized corporation has a vote and the constitutional question is purely academic.

ARGUMENT.

I.

No Person Can Invoke the Jurisdiction of a Court to Challenge the Constitutionality of a Statute Unless the Operation of the Challenged Statute Will Injure or Has Injured a Personal Right of the Challenger.

Absent the elements of personal right in the plaintiff, there is no justiciable issue and a court is without jurisdiction to hear the case. To take jurisdiction would be to depart from the concept of judicial power and do violence to the principle of separation of powers.

Massachusetts v. Mellon, 262 U. S., 447, clearly enunciates this principle in the fifth syllabus as follows:

> "To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The Court of Common Pleas, the original court in this case, recognized that it is a court and not a council of revision and that as a court it must require the litigant who invokes its jurisdiction to have some direct, tangible and practical interest in the question litigated. The rule, and the reasons for it, were stated by Mr. Justice Sutherland as follows:

> "The functions of government under our system are apportioned. To the legislative dspartment has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of

the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. Gaines v. Thompson, 7 Wall., 347. We have no power **per se** to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

(Massachusetts v. Mellon, supra, page 488.)

This proposition has been reaffirmed many times, a recent example being in the case of Stark v. Wickard, 321 U. S., 288, where Mr. Justice Reed in delivering the opinion of the court, said at page 304:

"It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity

> of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers."

The trial court stated, and the discussion above emphasizes, that the petitioners' lack of a right to invoke the jurisdiction of the court to challenge the constitutionality of the mutualization statutes is based on the constitutional limits to judicial power. This being fundamental and hinging on the basic constitutional doctrine of separation of powers it cannot be circumvented by a mere change in the method of procedure. This defect exists as much whether the procedure is by way of injunction or by way of a declaratory judgment. The declaratory judgment statutes in Ohio, Section 12102-1 et seq., although broad in language, clearly comprehend this fundamental limitation. The language of Section 12102-1 while broad in scope is obviously intended to include only such questions as constitute actual controversies between parties who will be affected thereby. Sections 12102-2 and 12102-11 expressly require that parties who raise questions for declaratory judgment shall be affected by the declaration.

Petitioners' brief discloses that they have apparently misunderstood the opinion of the courts below and the cases cited therein and have erroneously concluded that the lower courts' decisions were based on the theory that the petitioners' lack of a standing to sue was due to their failure to meet the technical requirements for an injunction. The petitioners' discussion of the significance of the case of Massachusetts v. Mellon, supra, which appears at pages 10-12 of their brief, discloses that they distinguish it on the ground that it was an action for injunctive relief rather than a declaratory judgment. Petitioners completely missed that point in the Mellon case to which the Common Pleas Court was referring in his decision. Along with the

case involving the state of Massachusetts was the companion Frothingham case decided by this court in the same opinion, both cases being properly cited as "Massachusetts v. Mellon." Both cases involved attempts to restrain the secretary of the treasury (Mellon) from complying with the provisions of the so-called "Maternity Act." That portion of the decision which deals with the action brought by the state of Massachusetts has no bearing whatsoever on the instant case although it is the only portion of this court's opinion discussed by the petitioners. The latter part of this court's opinion, however, deals with the suit brought by Frothingham as a federal taxpayer. The court first decided that the interest of a federal taxpayer in the expenditure of federal funds, unlike that of a municipal taxpayer in municipal funds, is so remote as to give him no legal or justiciable right therein. Having decided that the plaintiff had no legal interest which could be injured or damaged, the court then went on to decide that as a matter of judicial power and constitutional principle it could not pass on the constitutionality of a statute at the behest of one lacking such an interest. It was from the language which is the classic formulation of this fundamental principle that the quotation found in the opinion of the Common Pleas Court was taken. This was a matter of power rather than procedure and Mrs. Frothingham would have fared no better had she cast her suit in the form of a prayer for a declaratory judgment than she did when she proceeded in equity for an injunction. As was said by Borchard on Declaratory Judgments (2d Ed.), 237:

> "* * * the power to render a declaratory judgment does not empower the courts to expand their jurisdiction over subject matter * * *."

This court has itself made this point clear in many cases including the case of Coffman v. Breeze Corporations, Inc., et al., 323 U. S., 316, where it is said (p. 324):

> "The declaratory judgment procedure is available in the federal courts only in cases involving an actual case or controversy * * *, where the issue is actual and adversary, * * * and it may not be made the medium for securing an advisory opinion in a controversy which has not arisen. * * *
>
> In any case, the court will not pass upon the constitutionality of legislation in a suit which is not adversary, * * * or upon the complaint of one who fails to show that he is injured by its operation, * * * or until it is necessary to do so to preserve the rights of the parties." (Citations omitted.)

In Nashville, C. & St. L. Ry. v. Wallace, 288 U. S., 249, the first case in which this court considered the question whether under Article III, Section 2, it had the power to review a state court decision rendered under a declaratory judgment statute, it decided that it had that power but only if there was a real dispute involving real and substantial rights.

In the recent case of Federation of Labor v. McAdory, 325 U. S., 450, this court reiterated this principle, saying at p. 461:

> "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit."

Further in the same opinion at page 463, the court added:

> "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other."

Clearly therefore petitioners can only invoke the jurisdiction of this court, as of the courts below, to declare the complained-of statutes unconstitutional if they can show that the operation of those statutes will injure or has injured them in some personal right. This they have neither

alleged nor shown nor could they have done so. The courts of the state of Ohio concluded therefore that they were without jurisdiction to inquire into the constitutionality of these statutes at the behest of these petitioners. For the same reasons this court is also without such jurisdiction.

The petitioners, at pages 12 and 13 of their brief, go to great length in discussing and attempting to distinguish Stark v. Wickard, supra, again in an apparent misunderstanding of the use which the Common Pleas Court was making of that case in its opinion. That opinion, as a glance at the form of the citation in the lower court's opinion will show, was cited by the trial court, not for the facts or the decision of the case itself, but because in the course of his opinion Mr. Justice Reed so aptly reiterated the principle of the Mellon case. Mr. Justice Reed said that in order to secure judicial intervention a person must have a personal interest and only when that element of personal interest is present is the suit of "that character which constitutionally permits adjudication by courts under their general powers."

Mr. Justice Reed went on to say that the reason an action was permitted to the producers in that case was that they had a direct personal financial interest in the fund and its use by the secretary of agriculture. Because of this personal interest the court said those producers had standing to sue, saying at pages 308-309:

> "It is because every dollar of deduction comes from the producer that he may challenge the use of the fund."

It should be noted in passing that at page 12 of their brief petitioners quote what is purportedly Syllabus 8 from the Stark case. The official report of that case contains no "Syllabus 8" nor does any syllabus of the official report contain such a statement nor is the quotation to be found anywhere in the opinion itself.

II.

The Ohio Law Prescribing the Qualifications of Voters in the Policyholders' Meeting to Consider Mutualization is a Part of Petitioners' Contracts and They and Others Similarly Situated Have Only Such Voting Rights as the Law Provides.

These petitioners are mere contractors with the Western and Southern. Their contracts with that company were entered into on December 22, 1941, and subsequent dates. (Record, page 1.) Sections 9364-1 and 9364-8 of the Ohio General Code, the sections whose constitutionality is here being challenged, became effective on July 17, 1941. (Appendix C.) Those sections having been in effect when these petitioners entered into their contracts were as much a part of those contracts as if they had been printed on the face of each such contract. That the laws which subsist at the time of the making of a contract enter into and form a part of that contract as fully as if they had been expressly referred to or incorporated in its terms was enunciated by this court at an early date and has been consistently followed and oft reiterated. In Von Hoffman v. City of Quincy, 4 Wall., 535 at page 550, Mr. Justice Swayne speaking for this court said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

In Abilene National Bank v. Dolley, 228 U. S., 1, 5, Mr. Justice Holmes speaking for this court, fashioned this principle in the following language:

> "Contracts made after the law was in force of course are made subject to it, and impose only such obligations and create only such property as the law permits."

To a similar effect see Walker v. Whitehead, 16 Wall., 314; Edwards v. Kearzey, 96 U. S., 595, 601; Northern Pacific Railway Company v. Wall, Administrator, 241 U. S., 87; Farmers Bank v. Federal Reserve Bank, 262 U. S., 649.

These petitioners have contracted with the Western and Southern that if that company were to mutualize as provided by the statutes of the state of Ohio they would not participate in the vote of the policyholders on such mutualization unless at that time they held contracts of insurance totaling at least $1,000 in amount and which contracts had been in effect for at least one year. At the time such vote was held these petitioners possessed no policies of amount or duration. They cannot now complain that they were injured by being denied a right which they did not contract to have until and unless they might purchase policies in sufficient amount and hold them for a sufficient length of time to qualify for voting under the statutory provisions.

This action purports to be a class action by these policyholders on behalf of themselves and all of the other policyholders of the Western and Southern. We take it as axiomatic, however, that these policyholders cannot represent members of a class to which they do not belong and that no decree of this or any other court would be binding on any policyholder who, by virtue of his circumstances and the terms of his policy, is in a class different from these policyholders. These policyholders, if they are properly representative of any class, must be representative only of that class of policyholders who took their policies and made their contracts with the Western and Southern after the enactment of the statutes in question and whose contracts therefore contained the terms of those statues as clearly as if they had been written on the face of such contracts. Such is the law of Ohio (Quinlan v. Myers, 29 O. S., 500, 507) and must be the law of this case in this court.

III.

Petitioners' as Policyholders Have No Personal Right or Interest in the Only Matters Affected by Mutualization and Therefore Can Suffer No Personal Injury or Damage as the Result of the Operation of the Statutes Whose Constitutionality They Seek to Challenge.

Quite apart from petitioners' lack of interest under their particular contracts, their lack of interest, as policyholders, as well as the lack of interest of any policyholder, in the capital or surplus of the Western and Southern has been established by the consistent holdings of the Ohio courts. The Western & Southern Life Insurance Company is an Ohio corporation. It has never issued a participating policy and all of its contracts with its policyholders are promises to pay the respective face amounts upon death and to afford certain privileges of cash-surrender, extended insurance, etc., all of which are protected by the company's reserve of $272,135,041.00 which has been established according to the law of Ohio. For many years it has been recognized by the Supreme Court of Ohio that the rights of holders of non-participating life insurance policies are measured solely by the contracts evidenced by their respective policies. In the case of Ohio, ex rel. National Life Insurance Association, v. Matthews, 58 O. S., 1, 6, Judge Bradbury said:

> "* * * the ultimate power to manage its affairs is lodged in its stockholders to the entire exclusion of its policyholders, for the right to attend corporate meetings as well as to elect its officers is vested solely in the former; whatever net profits may accrue from its business will ultimately go to its stockholders, the policyholders having no interest therein; the rights of the latter being measured by the contract evidenced by their respective policies."

Belden v. Union Central Life Insurance Company, 143 O. S., 329, was a companion case with Koplin et al. v. Ohio National Life Insurance Company which was decided at the same time and covered by the same opinion. Koplin was a non-participating policyholder of the Ohio National. Judge Bell at page 350 of his opinion said:

> "The claim that Koplin has any vested right in the organizational structure of Ohio National cannot be sustained either in logic or by authority."

In State ex rel. v. Union Central Life Insurance Company, 13 O. C. C. (N. S.), 49, affirmed without opinion 84 O. S., 459, the court said (pp. 52, 53):

> "This company had at the date in question a surplus of over $2,400,000. To whom does this belong? Undoubtedly to the company. And who are the company? The stockholders. Not a penny of it belongs to any policyholder. This surplus was accumulated by the company through a wise and judicious management of its business—the foundation of which was from the premiums paid into the company by its policyholders, the most of which came no doubt from the policies long since matured and which have been adjusted to the entire satisfaction of the policyholder and the company. This surplus adds strength and stability to the company as a whole, and is not there for the benefit or protection of the participating policyholders. It was not so intended and could not have been so understood. * * *
>
> There was no law or contract that compelled the company to create this surplus, and so far as we are aware there is no contract or law that compels the company to maintain it. Its maintenance, like its creation, must rest in the sound discretion of its board of directors. It can never be returned to the policyholders who created it, for the most of these contracts have terminated."

In the Belden case, supra, Judge Bell also pointed out at page 347,

> "These companies, if and when mutualized, will remain domestic life insurance corporations subject to

> the provisions of law applicable thereto and will remain subject to the supervision of the superintendent to the same extent as before mutualization.
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> The superintendent by the terms of the act in question is granted authority to determine, from an examination of the books of the company at the time his approval is requested, whether the company is in such financial condition that the conversion may be consummated without loss or harm to its creditors, its shareholders or its policyholders."

Section 9364-2b provides in part—

> "Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of such corporation."

Section 9364-8 provides in part—

> "The code of regulations of a mutual legal reserve life insurance corporation shall provide that such corporation shall issue no policy of life insurance or annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance or annuity."

It is, therefore, apparent that the only rights which these petitioners have, namely, those secured to them by their contracts of insurance, will be fully and adequately protected, that petitioners have no rights in the capital and surplus of the company and that the capital and surplus alone are affected by the purchase of outstanding stock. As to organizational structure, capital and surplus, the only matters affected by mutualization, petitioners as policyholders have exactly the same rights and interest therein, no more and no less, as the non-policyholding general public.

It should be noted further that petitioners do not claim that they have an interest in the capital and surplus, or that the plan of mutualization impairs the company's

ability to perform its contracts, or that the statutory provisions for protection of creditors or of policyholders are insufficient, or that the company intends to depart from the plan of mutualization, or that the superintendent of insurance will fail to perform his duty as enjoined by law. Nevertheless petitioners challenge the constitutionality of the statutes providing the manner of changing this capital structure and organization through mutualization. Such a challenge does not present a justiciable cause to this court.

IV.

Policyholders of an Ohio Stock Life Insurance Company Have No Constitutional Right to Vote on Mutualization.

Section 2 of Article XIII of the Constitution of 1851 provided:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

This language is continued in Section 2 of Article XIII in its form as amended in 1912. The reservation of power which was expressed in the foregoing language has remained unchanged since 1851. This reservation is as much a part of each policyholder's contract as if it were expressly written into each policy. As was said by Judge Sherick in Belden v. Union Central Life Insurance Company, 73 O. App., 267, at page 277:

> "Plaintiffs further knew when their contracts were entered into that Section 2, Article XIII of the state Constitution of 1851, as amended in 1912, provided that
>
> > 'Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.'
>
> That provision directly empowered the Legislature to enact the Mutualization Act which permits change

> of a stock life insurance corporation's charter by amendment. It permits alteration in insurance purpose. It permits change in organization and structure, so long as the obligations of existing contracts of insurance are not impaired."

Affirming the appellate court, Judge Bell, in Belden v. Union Central Life Insurance Company, 143 O. S., 329, said at page 341:

> "This provision was in full force and effect when each of the appellants entered into his contract with his respective company and therefore he could have no vested right in the corporate structure of the company. He knew or is presumed to have known that the General Assembly had express constitutional authority to authorize a change in the organization or structure of any corporation formed under the laws of this state."

It should be noted that it is not the intention of this respondent to contend that there was a power reserved in the Ohio legislature to deprive petitioners of any interests arising out of their contracts of insurance or otherwise unconstitutionally to affect any vested rights which they might have. Once it is conceded, however, as it must be for an Ohio stock life insurance company under the decision in the Belden case, supra, that petitioners' "vested right in the organizational structure of (this corporation) cannot be sustained either in logic or by authority," (p. 350) then it is obvious that the general assembly, when exercising its reserved right to make a structural change may prescribe the manner in which that change may be made without the consent of any policyholder.

This court has stated the rules and the distinction to which we have just referred in the two cases of Wright v. Minnesota Life Insurance Co., 193 U. S., 657, and Polk v. Mutual Reserve Fund Life Association of New York, 207 U. S., 310. These cases, read together, fully answer the petitioners' contention and are conclusive on these points.

In the Wright case the defendant company was organized to write insurance on the assessment plan. It amended its articles so as to become a level premium company. The plaintiffs were the owners of assessment policies—that is, each was required to pay in accordance with a plan by which sufficient money was raised to pay the death claims as they arose. Under the level premium plan a policyholder paid a level premium each year and was not subject to assessments. Inevitably the operation of the company on the level premium plan would result in gradual reduction of the number of policyholders subject to assessment and therefore increase the annual assessments of the survivors. The plaintiff complained that such action unconstitutionally impaired their contractual rights.

The Minnesota law provided for approval of this structural change by a majority of the members of the assessment company. The plaintiffs contended that this statute was unconstitutional since the company had begun as an assessment company and plaintiffs argued that its plan of operation could never be changed without the consent of all those interested. This court rejected their contention, using the following language:

> "* * * where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right." (193 U. S., pages 663-664.)

In the Polk case the New York statute authorized an assessment company to change to a general life company upon the vote of the directors alone. Policyholders were not to be consulted. The plaintiffs in that case sought to

avoid the Wright decision by objecting to the statutory provision for actions by directors alone; that is, by objecting to the manner in which the change was to be made. Their contention was explained and rejected by Mr. Justice Moody in the following language (page 326):

> "Second, it is said that in the Wright case the change was made by the majority of the members of the association, while in the case at bar it was made by a majority of the directors without the consent of the members. But in each case the change was made in conformity with the provisions of the law authorizing it, and if the legislature has the constitutional power to authorize the change by the vote of a majority of the members it has the power to authorize the change by a vote of a majority of the directors. The rights of a protesting member are no more impaired in one case than in the other."

The Wright and Polk cases are authority for the fundamental propositions that states may reserve the power to change the corporate structure of insurance companies; states may provide the manner in which such changes shall be made; and where, as is the case here, vested rights of policyholders are not impaired by the structural change, states may permit such changes to be made without either the knowledge or consent of the policyholders.

V.

Section 9364-1 Does Not Extend to Policyholders' Rights or Privileges of the Character Which Are Protected by the Constitutional Guaranty of Equal Protection of the Laws.

Petitioners apparently proceed on the assumption that if the state permits any policyholders to vote, it must give a vote to every policyholder and must give each policyholder the number of votes which is commensurate with the face amount of his policy.

It has been demonstrated that policyholders have no vested rights in the organizational structure of the corporation, that changes in the structure may be made without their consent or knowledge, and that the change from a stock company to a mutual company does not impair policyholders' contracts or deprive them of any property interests. Such being the state of facts involved, petitioners must mean, although they do not say, that notwithstanding the state need not provide for any vote, yet, if it provides that some may vote it must permit all to vote.

This assumption is based upon a wholly erroneous meaning which appellants probably ascribe to the words "privileges" and "liabilities" as they are used when speaking of the constitutional guaranty of equal protection.

The liabilities to which the constitutional guaranty extends are not mere shadows. They are such liabilities as actually exist and may be enforced. The same is true of privileges. Each word carries the necessary connotation that the privilege accorded or the liability imposed must affect the individual's person or property. The privilege must be a thing of personal economic gain and the liability must entail loss of liberty or property. The Constitution extends its guaranties to matters of practical importance, not to so-called liabilities which cannot be enforced or to so-called privileges by which no one could gain.

Under its regulatory power the General Assembly could condition mutualization upon such terms as it saw fit. It chose to require votes by the directors, the stockholders, policyholders of substantial amounts and approval of the superintendent of insurance. It could have omitted any of these requirements,—even the vote of the stockholders provided it prescribed a means of protecting their vested property rights. It could have added other requirements which in the legislative wisdom might have been deemed appropriate. When it provided for a vote by those policy-

holders whose insurance was of sufficient amount and duration to satisfy the General Assembly, it accorded to those voters no privilege which was of personal value, imposed upon them no liability which could be enforced.

It is a well established principle that in such cases one not chosen by the legislature to perform such a function cannot complain that he has been deprived of equal protection of the laws. In the case of Ex Parte Gerino, 143 Cal., 412, 66 L. R. A., 249, the California statute prescribed that admission to the practice of medicine should be upon examination by a board consisting of members appointed by various medical societies. The statute was challenged on the ground that it denied equal privileges to other societies, but the court held:

> "In our opinion, the power to appoint officers in such cases is not one of the rights or privileges contemplated by the provisions of the Constitution upon which the petitioner relies. It is more in the nature of a duty than of a right or privilege. The rights and privileges referred to in those guaranties and limitations must be something for the individual benefit or advantage of the person or association upon which they are conferred, and not the power to perform a public duty for the benefit of other persons or of the public."

To the same effect see Re Mt. Sinai Hospital, 250 N. Y., 103, upholding a New York statute amending the corporate charter of non-profit institutions so as to provide that thereafter vacancies in the board of trustees should not be filled by the vote of the entire membership but rather by the vote of the remaining member trustees, the court holding that since the members had "no beneficial interest of their own to protect, no definite right secured to them by a contract with the corporation", the equal protection of the laws was not withheld by providing for a change in voting rights.

See also Elrod v. Willis, 305 Ky., 224; 203 S. W. (2d), 18, where the court upheld Kentucky legislation for the administration of a servicemen's board by persons appointed by the governor from nominations made by the American Legion, notwithstanding the protest of Veterans of Foreign Wars and similar organizations.

Bullock v. Billheimer, 175 Ind., 428; 94 N. E., 763, where private agricultural societies when appointing representatives to administer work of the agricultural experiment station were held to be performing public duties rather than exercising private privileges. *Semble,* Kotch v. Pilot Commissioners, 330 U. S., 552.

Similarly, with the provisions made by the legislature for overseeing and accomplishing the execution of its directions with regard to the mutualization of a stock life insurance company. It could have provided for more, less, or different means of accomplishment and execution of its policy; but to the extent that it does place on any group or groups the function of executing its policy, the persons not selected to perform such function have not been deprived of any right or privilege guaranteed to them by equal protection, due process or any other provision of the state or federal constitutions.

VI.

Section 9364-1 of the General Code is Valid. Its Limitations Are Not Unreasonable or Arbitrary, But Are Within the Discretion of the General Assembly.

Of the approximately 2,666,666 policyholders of the company, the General Assembly has selected those policyholders whose insurance amounts to at least $1,000 and whose policies have been in force at least one year prior to the meeting as the policyholders who must approve a plan of mutualization. Their number exceeds 660,000. Obviously no distinction is made between policyholders in

like circumstances and conditions. Every policyholder whose insurance equals $1,000 and whose policy has been in force for a year is given a vote. None whose insurance is less than $1,000 or of less than one year's standing has a vote on mutualization.

Petitioners contend that those whose insurance is less than $1,000 or whose insurance has been in force for less than one year are denied the equal protection of the laws because they were not given votes in proportion to the amount of insurance held by them. Petitioners ask (Brief, page 21) if the statute would be upheld if no policyholders were entitled to vote. The answer is "yes."

Because all of the policyholders in question hold non-participating policies, they had no interest in the company or in its assets but had only contractual rights, which are in no way affected by the mutualization. The General Assembly could as well have dispensed with the approval of all policyholders as it could (and does) dispense with the approval of any creditor in a reorganization or in the purchase of its own stock by a corporation organized under the General Corporation Act.

In Polk v. Mutual Reserve Life Insurance Association of New York, discussed at page 22, supra, the court said:

> "If the legislature has the constitutional power to authorize the change by the vote of a majority of the members, it has the power to authorize the change by a vote of a majority of the directors."

In the case of Field v. Barber Asphalt Paving Company, 194 U. S., 618, the plaintiff sought relief against tax assessments on the ground that the act under which they had been made violated the equal protection of the laws. Under the act in question resident owners of the property liable to taxation were allowed a protest, while non-resident owners were not. In upholding the law this court said, at page 622:

> "The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resi-

dent property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. Buchanan v. Broadwell, 88 Missouri, 31. If the legislature saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution."

The law provides that each policyholder with the necessary qualifications shall have but one vote, regardless of the amount of insurance held. Petitioners say that this provision also denies them equal protection, apparently assuming that there is something in the equal protection clause requiring that the legislature shall provide that the policyholder having the lowest amount of insurance shall be entitled to one vote, and all other policyholders shall be entitled to the number of votes by which the amount of their insurance is a multiple of the lowest policyholder's insurance. But there is nothing in the Constitution or the statute or in common sense which requires such rule. At common law each stockholder of a private corporation has one vote, regardless of the amount of his investment (18 Corpus Juris Secundum, Corporations, Sec. 549, page 1247). This is the common law of Ohio (State ex rel. v. Gray, 20 O. App., 26) but the statute (Sec. 8623-50) now permits ad valorem voting in corporations having stockholders. The common law is retained for members of corporations without stockholders (Sec. 8623-104).

Petitioners, however, concentrate their attack upon the provision that only those having insurance equal to $1,000

may vote. They contend that the distinction thus made is absolutely without justification, is arbitrary and unreasonable. As was stated by Mr. Justice Holmes in Buck v. Bell, 274 U. S., 200 at page 208, the claim that state legislation violates the equal protection clause of the Fourteenth Amendment "is the usual last resort of constitutional arguments."

The record in this case shows that there were approximately 2,666,666 policyholders of the defendant company and that the changes in the policies issued by the company averaged more than 11,000 per week. These facts show the enormous amount of clerical labor and expense which would necessarily be involved in any election or vote conducted among all the policyholders. Obviously, limitations of the class of policyholders to whom ballots must be sent would greatly assist in reducing the labor and expense involved in conducting any such a vote. Apparently the legislature considered that the position of the policyholders as a whole, especially in view of the other safeguards upon mutualization (approval of the superintendent, finding of proper financial condition, etc.) would be sufficiently protected by limiting the vote in the manner provided by the statute.

Ohio was not the first state to draw a line in such cases, nor was the line which it drew either new or unusual. The classifications adopted were not conceived by the Ohio General Assembly in 1937 when Section 9364-1 was adopted in substantially its present form so far as concerns the matters now under discussion. These classification were borrowed from a New York statute which had been in effect for many years. Both the one year and the $1,000 limitations are the same as those provided by the law of New York. (29 McKinney Laws, Insurance Law, Sec. 199.)

The question presented to the court is whether the legislature had the power to so limit a vote which it was not required to give at all. Petitioners contend that since con-

ceivably the legislature might have given a vote to each policyholder in proportion to the amount of his insurance, it was required to do so. However the authorities do not sustain this contention.

It is unnecessary for our purposes and would be a burden on this court to interlard this brief with exhaustive discussion and citation of the myriad cases in which this court has passed on and discussed the question of reasonable legislative classification. Certain fundamental principles which are peculiarly apposite to the facts of this case can be briefly summarized as follows:

a. There is a presumption of validity which attaches to legislative action which puts the burden on the petitioners in this case to show that the classification made by the Ohio legislature was so unreasonable that a court could say that there was no rational basis within the knowledge and the experience of the legislators upon which such a classification could rest. Metropolitan Co. v. Brownell, 294 U. S., 580.

b. It is the duty of a court when such a challenge is made to resolve all reasonable doubts in favor of the legislature and to sustain the action of the legislature if any reasonable basis for the distinction made by the legislature can be found. Corporation Commission v. Lowe, 281 U. S., 431.

c. Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. International Harvester Co. v. Missouri, 234 U. S., 199.

d. The fact that the court disagrees with the wisdom of the legislature in making the challenged justification is not sufficient to justify striking down the action of the legislature. Bayside Fish Co. v. Gentry, 297 U. S., 422; Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549.

e. Classification based on numbers alone is not necessarily unreasonable. Bryant v. Zimmerman, 278 U. S., 63.

Applying these principles to the facts presented to this court by the record herein, it is submitted that petitioners have completely failed to sustain their burden of showing that the classification between classes of policyholders made by the Ohio legislature in the mutualization act is without any possible reasonable basis. The presumption of validity which attaches to the action of the legislature has not been rebutted. The facts heretofore developed demonstrate that the policyholders were not as a matter of right entitled to be consulted at all in the making of these changes in corporation structure; that the legislature nevertheless desired to permit a representative group of policyholders to participate in the mutualization process; and that the large number of policyholders whose identities were changing momentarily made it impossible for the legislature to achieve that desire without drawing a line between classes of policyholders based on amount and duration of contract. It is submitted that in view of these facts there can be no substance to the contention that the line which the legislature did draw between classes of policyholders rests on no rational basis. The legislature might perhaps have drawn the line a little wider and still have made its policy administratively achievable but the fact that the line could possibly have been drawn at some place other than where it was does not make the action of the legislature subject to attack on the grounds of an unreasonable classification. Mr. Justice Holmes achieved a classic formulation of this principle in his dissenting opinion in the case of Louisville Gas Co. v. Coleman, 277 U. S., 32, where he said at page 41:

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems

> arbitrary. It might as well or nearly as well be a little more to the one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

In the instant case the rights of all policyholders existing before mutualization are preserved intact. This is true whether or not they are given a vote on mutualization. The policyholders who are given a vote do not acquire any valuable personal right or privilege but, as pointed out above, serve merely as a part of the process of mutualization. This point is emphasized by the fact that the petitioners do not claim that the result of the vote would have been different had all policyholders been given a vote nor do they claim that the price fixed for the shares was excessive or the reserves remaining inadequate.

Petitioners cite the case of Gulf, Colorado and Santa Fe Railway Company v. Ellis, 165 U. S., 150. In the Gulf case a Texas statute required railroads as such to pay an attorney's fee to the successful adversary in lawsuits involving claims of less than $50.00. Railroads alone were singled out for the application of this penalty. No reason was presented for distinguishing railroads from any other class of corporations or of defendants. The Gulf decision should be compared with the provisions of the Federal Code limiting diversity jurisdiction to cases involving $3,000 or more. Obviously, the purpose of the $3,000 limitation is administrative convenience only. It is designed to prevent clogging the federal docket with inconsequential cases. There is no conceivable analytical difference between a negligence case involving $2,000.00 and one involving $3,001.00. Nevertheless there is no question as to the validity of the $3,000 limitation. So in the case at bar the legislature limited the vote to policyholders with a substantial amount

of insurance in order to afford a feasible, practical method of obtaining the views of policyholders. While it appears that a large number of policyholders did not receive a vote, it also appears that some 666,666 policyholders did receive notice and a ballot. This is a very large number of people to consult on a question such as mutualization wherein the policyholders have everything to gain and nothing to lose. They are guaranteed against loss by the statutory provisions requiring that the superintendent be assured that sufficient funds are left in the company to meet all the obligations of the company and to fulfill the contracts which the policyholders own. There is no reason to suppose that any substantial group of policyholders would have views opposed to that of any other substantial group of policyholders. Clearly the legislature, while protecting the rights of all policyholders by other methods could, as it did, require the approval only of those policyholders having a substantial amount of insurance without injuring others since none of them had any rights in any event.

VII.

Petitioners Cannot Complain of Voting Qualifications Provided by Section 9364-8 at the Time Petitioners Secured Their Policies. Petitioners' Contentions Are Wholly Anticipatory and Frivolous.

Section 9364-8 was in effect when petitioners procured their policies. The provisions of this section became a part of their policies (see Subdivision II of this brief). Petitioners' position is similar in fact and precisely the same in legal effect as that of persons who purchase stock at a time when the articles, or the law which is a part of the articles, provide voting qualifications of classes of stockholders.

Petitioners' contention is premature and frivolous. Section 9364-8 applies to the annual meetings of members of

the corporation after it has become mutualized. When this suit was filed the corporation was a stock company and the process of mutualization was not had completed. The first meeting of members of the mutualized company will not be held until March of 1949. No one has threatened to deny any policyholder a right to vote at that meeting. To the contrary, respondent intends that every policyholder shall have a right to vote. This court does not anticipate constitutional questions which may arise in the future. (Anniston Manufacturing Co. v. Davis, 301 U. S., 337, 355; New Jersey v. Sargent, 269 U. S., 328, 338-340; Ashwander v. Tennessee Valley Authority, 297 U. S., 288, 324-325.)

The Western and Southern intends to admit all policyholders to the annual meeting of 1949 and permit every policyholder to vote, being of the opinion that Section 9364-8, when properly construed, does not forbid such action. Petitioners insist that this section must be construed as denying their voting rights and that the section is therefore unconstitutional. This is the "controversy" upon which this phase of the suit is grounded. Petitioners insist on a vote for each member, insist that respondent may not carry out its intention to permit such a vote because the law forbids it and then insist that the law is unconstitutional.

It should be noted that the mutualized corporation is subject to the provisions of the Ohio General Corporation Act relating to corporations not for profit (The State v. The Standard Life Assn., 38 O. S., 281) which provides:

> "Unless otherwise provided by law, the articles or by the regulations, each member of a corporation not for profit shall be entitled to one vote." (Sec. 8623-104.)

It should be further noted that the common law of Ohio, in the absence of statutory or contractual restrictions, gives a vote to each member of an Ohio corporation. If respondent construes Section 9364-8 correctly each member will

have a vote, but if petitioners construe the section correctly and the section, as so construed, is unconstitutional, then each member will still have a vote. It is only in the event that respondent's construction is wrong, that petitioners' construction is right, and that the section **is** constitutional, that members' voting rights will be restricted. In that event neither petitioners nor respondent may complain.

Such being the case, the court will not pass upon the constitutionality of the statute in order to assure the parties, petitioners and respondents, of the correctness of their common conclusion that each member is entitled to a vote, or to disappoint that conclusion by holding that the statute, although misconstrued by respondents, is constitutional. To do so would be to depart from long-established rules of this court relating to the disposition of constitutional questions. (Liverpool, New York and Philadelphia Steamship Co. v. Commissioners of Emigration, 113 U. S., 33, 39; Ashwander v. Tennessee Valley Authority, 297 U. S., 288, 346-347.

Respectfully submitted,

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APPENDIX A.

Opinion—Court of Appeals.

(Rendered on the twenty-third day of January, 1948.)

By the Court:

This is a law appeal from the Court of Common Pleas of Franklin county, Ohio. The action was one for a declaratory judgment seeking to be declared as invalid and unconstitutional Sections 9364-1 and 9364-8 of the General Code of Ohio. The trial court, in a lengthy and well considered opinion, after setting forth the facts admitted by the pleadings, found that these facts were not sufficient to entitle the plaintiffs to invoke the jurisdiction of the Common Pleas Court to determine the constitutionality of these statutes. However, in view of the importance of the questions raised, it deemed it proper to consider the claims of the plaintiffs as to the unconstitutionality of the aforesaid sections, and after so doing it declared them to be constitutional. The assignments of error are all directed to these rulings by the trial court. For this court to write an extended opinion would serve no good purpose as we find the authorities for the rulings are fully set forth in the opinion of Judge Gessaman, which we adopt in its entirety as that of our own.

We find no error in the record and the judgment is affirmed.

Wiseman, P. J., Miller and Hornbeck, JJ., concur.

APPENDIX B.

Decision—Court of Common Pleas.

(Rendered on the first day of July, 1947.)

Gessaman, J.:

This is an action for a declaratory judgment presented to the court upon the fourth amended petition and the separate answers of the defendants. Plaintiffs allege that they bring the action upon their own behalf as policyholders of defendant company and on behalf of the company and all policyholders. The issues will be understood by a brief review of the fourth amended petition (hereinafter referred to as the "petition").

Plaintiff, William L. Chesbrough, alleges that he purchased a policy of life insurance from the defendant company on February 2, 1942, in the amount of $500.00 and one on July 16, 1946, in the amount of $5,325.00.

Plaintiff, Mildred J. Chesbrough, alleges that she purchased a policy of life insurance from the defendant company on December 22, 1941, in the amount of $500.00; one on December 13, 1943, in the amount of $284.00 and one on February 1, 1944, in the amount of $1,000.00.

Plaintiffs further allege that on October 8, 1946, the directors of defendant company adopted a plan of mutualization whereby defendant company would be converted from a domestic stock life insurance company to a mutual life insurance company without capital stock; that by this plan defendant company would acquire all of its outstanding stock ($30,000,000.00) in exchange for United States bonds of the par value of $39,960,000.00; that each policyholder shall become a member of the corporation; that said plan was approved by the stockholders of the company on October 8, 1946; that a meeting of those policyholders specified in Sec. 9364-1, G. C., was held on January 30, 1947, and that, by vote held in the manner specified in said section the plan was approved; that said

plan will be submitted to the superintendent of insurance for his approval or disapproval.

Plaintiffs further allege that 86% of the outstanding policies of the company were for amounts less than $1,000.00; that this amount represents 75% of the policyholders, all of whom had no right to vote by virtue of the provisions of Sec. 9364-1, G. C. Plaintiffs then allege that Sec. 9364-1, G. C., denies to the policyholders of defendant company "equal protection of the laws and is discriminatory in contravention of the Constitution of the United States of America and the state of Ohio" in four respects, namely: (1) In that it "grants the right to vote on a plan of mutualization only to those policyholders insured in an amount of at least $1,000.00, and whose policy at the time of the policyholders' meeting, shall have been in effect for at least one year"; (2) In that it grants to such policyholders only one vote regardless of the number of policies owned or held; (3) In that it denies the right to vote to a large number of policyholders (those not qualifying as above set forth); and (4) In that it denies the right to vote to policyholders whose policies have been in effect for less than one year.

In substantially the same respects plaintiffs allege that Sec. 9364-8, G. C., denies to the policyholders the equal protection of the laws and is discriminatory in contravention of the Constitution of the United States of America and of the state of Ohio.

Plaintiffs then pray that the court find that Sec. 9364-1, G. C., and Sec. 9364-8, G. C., be held to be invalid and unconstitutional and particularly in those respects above set forth.

The defendant company admits practically all of the allegations of the petition except the allegation that the action is brought on behalf of the company and all policyholders, and the allegations of unconstitutionality, all of which it denies.

Before proceeding to consider the points at issue, it should be pointed out that, of the four steps required by Sec. 9364-1, G. C., et seq. for mutualization, the first three have been taken and there is no question but that they have been taken according to law. The fourth step (action by the superintendent of insurance) yet remains.

The first issue upon which the parties disagree is the plaintiffs' right to invoke the jurisdiction of the court to determine the constitutionality of the mutualization statutes. On this and other issues, counsel have submitted a large number of authorities. To review them all would only unduly extend this opinion. Therefore, we shall refer only to those which we feel are decisive of the issue under consideration.

Counsel for plaintiffs urge that the declaratory judgment act (Sec. 12102-1, G. C., et seq.) is broad enough to permit such an action in a situation where "it is perfectly obvious that situations might well arise in connection with the conversion * * * wherein the liquidation of the capital and surplus accounts, together with other factors, would make it undesirable to the point that the policyholders would be overwhelmingly, or even unanimously, opposed to the mutualization which would ipso facto make them members of the corporation and responsible for the future conduct of the business". (Brief of plaintiffs, p. 3.) At no point, however, either in the petition or in plaintiffs' briefs, do we find any definite allegation or claim that plaintiffs have been or will be injured by the proposed plan in any particular respect.

It is well settled that the holder of a non-participating policy—such as those in this case—has no vested right in the organizational structure of the company.

> "The claim that Koplin has any vested right in the organizational structure of Ohio National cannot be sustained either in logic or by authority."
>
> (Citing Ohio, ex rel. Nat'l Life Assn., v. Mathews, Supt. of Ins., 58 O. S., 1.)
>
> Belden v. Union Central Life Ins. Co., 143 O. S., 329.

See also State, ex rel. v. Union Central Life Ins. Co., 13 O. C. C. (N. S.), 49.

It also seems well settled, both on reason and authority that,

> "To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."
>
> Massachusetts v. Mellon, 262 U. S., 447, Syl. 5, and p. 488.

See also Stark v. Wickard, 321 U. S., 288 at p. 304.

> "This statute (declaratory judgment) is available only to those persons who have an 'actual controversy'. Persons are not entitled to litigate questions which may never affect them to their disadvantage."
>
> Driskill v. Cincinnati, 66 O. S., 372, at p. 374.

It is true that the General Assembly has directed, in Sec. 12102-12, G. C., that the declaratory judgment act shall be "liberally construed and administered", but it appears to be equally true that one may not challenge the constitutionality of a statute unless and until he has an "actual controversy" or "he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement". Since plaintiffs have no vested right in the organizational structure of defendant company, it is quite clear that there is, then, no allegation in the petition or even a claim in the briefs that plaintiffs have sustained or even that they are in imminent danger of sustaining some direct injury. The claim or argument that some "situations might arise" that "would make mutualization undesirable" certainly does not give rise to a right to invoke the jurisdiction of a court for a declaratory judgment.

Under the facts as alleged, it is the opinion of the court, that the plaintiffs are not in position, nor do they have the right, to challenge the acts complained of or the constitutionality of the statutes in question.

II.

In view of the importance of the questions raised, we deem it proper for the court to proceed to consider the claims of plaintiffs as to the unconstitutionality of Sec. 9364-1, G. C., and Sec. 9364-8, G. C., first, as to Sec. 9364-1, G. C.

This section was first enacted by the General Assembly in 117 O. L., 608, and became effective August 23, 1937. It was amended, to take its present form, in 119 O. L., 70, effective July 17, 1941. All of the policies of insurance which plaintiffs allege that they hold, were purchased by them subsequent to July 17, 1941. Therefore, when they purchased the policies they were presumed to know that the General Assembly had authorized these changes in corporatè structure of defendant company, and in the methods set forth in the statute. Sec. 2, Art. XIII of the Ohio Constitution provides, in part, as follows:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. * * *"

As stated in Belden v. Union Central Life Ins. Co., supra, at pp. 341-2:

> "This provision of the Constitution was adopted on September 3, 1912, and affords full and complete authority to the General Assembly to provide by general laws for the formation of corporations and for changes in the organizations or structure of existing corporations.
>
> "This provision was in full force and effect when each of the appellants entered into his contract with his respective company and therefore he could have no vested right in the corporate structure of the company.

> He knew or is presumed to have known that the General Assembly had expressed constitutional authority to authorize a change in the organization or structure of any corporations formed under the laws of this state."

To which we add, that when plaintiffs purchased their policies, they knew or were presumed to know that the General Assembly had authorized the changes here complained of and in the manner here attacked; furthermore, that plaintiffs, by virtue of the constitutional and statutory provisions then in effect, had no vested right in the corporate structure of the defendant company. Therefore, this question must be approached with those principles in mind.

It must be remembered that plaintiffs do not allege that the proposed change has or will impair, in any respect, the obligations of any of their contracts of insurance. The questions are, merely, does Sec. 9364-1, G. C., deny to plaintiffs the equal protection of the laws or is it discriminatory in any of the respects heretofore set forth?

We must also keep in mind that it was also held in the Belden case, supra, at p. 348 (referring to Sec. 9364-1, G. C., et seq.):

> "From what has been said, it follows that the act is not unconstitutional and void upon its face."

And also that, (p. 349),

> "Where, as here, an attack is made upon an act which is valid on its face, upon the ground that, as applied to a given state of facts, it is invalid, the burden rests upon the party making such attack to present clear and convincing evidence of a presently existing state of facts, which make such act unconstitutional and void when applied thereto."

Plaintiffs' claim of unconstitutionality is based upon the fact that certain of the policyholders do not have the right to vote and that those who do, have only one vote regard-

less of the number of policies held. It will, of course, be conceded that there is nothing in either the Constitution, or in plaintiffs' contract which grants to them any right to a voice in the proposed change. The only voice given to a policyholder is that specified in Sec. 9364-1, G. C., and to those who can qualify thereunder. It is a voice voluntarily and gratuitously given, not one which the legislature was required to give. How, then, can the fact that some were given the right and others not, violate any provision of either the United States or Ohio Constitutions? Counsel for plaintiffs have not referred to any specific section of either Constitution, and, boiled down, their claim is that the classification set forth in Sec. 9364-1, G. C., is unreasonable and discriminatory. Again, we ask, how can such legislative classification be discriminatory or deprive plaintiffs of the equal protection of the laws, when neither by Constitution or by contract did they have any voice in such matter? We think that it cannot be.

Many cases have been cited by counsel for both sides upon the question of what is and what is not a proper classification. The law is well summarized in 12 Am. Jur., pp. 214-216 (Sec. 521, Constitutional Law):

Page 216:

> "All reasonable doubts must be resolved in favor of a classification made by the legislature, and it is the duty of the court to sustain it if any real distinction can be found."
>
> "The authorities cumulatively establish the rule that the assailant of a classification must clearly establish invalidity * * *."

The only facts before the court are those admitted allegations of the petition to the effect that a certain percentage of the policyholders are not entitled to vote. Under the rule above set forth, that fact does not per se make statute unconstitutional or invalid. Various reasons, in argument, have been adduced for the classification as

enacted, such as minimizing the cost of conducting the election, the saving of time, etc., but none of these need be considered. Based upon both reason and authority, the classification is not, per se, unconstitutional and no facts have been pleaded which prove it to be unconstitutional. Furthermore, we revert to our original conclusion, since plaintiffs did not either by Constitution or by contract, have a right to a vote in such matters, the granting of the right to some, as a gratuity, but not all, does not make the act unconstitutional in its operative effect.

It should here be observed that the approval of the policyholders who can qualify, is the third of four steps necessary for the change. The first is the approval of the board of directors, which has been done. The second is the approval of the stockholders, which has also been secured. The last is the approval of the superintendent of insurance, which has not yet been secured. But we call attention to these four steps to emphasize the fact that great precaution has been required by the General Assembly, and that finally, for the protection of all concerned, the superintendent of insurance may disapprove the plan or he may approve it if he finds that "the company is in such financial condition that the conversion may be consummated without loss or harm to its creditors, its shareholders or its policyholders". (Belden case, supra, pp. 347-348.)

It is our opinion, therefore, that the classification set up in Sec. 9364-1 is not discriminatory and that it does not deny to plaintiffs the equal protection of the laws.

III.

In considering the question that has been raised in connection with Sec. 9364-8, G. C., it is important to note that plaintiff, Mildred J. Chesbrough, is the holder of $1,000.00 policy of insurance purchased from the defendant

company on February 1, 1944. Therefore, she is entitled to vote at a policyholders' meeting. The plaintiff, William L. Chesbrough, is the holder of a $5,325.00 policy purchased from defendant company on July 16, 1946. Therefore, in only a few days he will be entitled to a vote. Therefore, for all practical purposes, there can be no dispute between the parties on this point. The first annual meeting is set for March 8, 1948, and it would hardly be possible to call a special meeting between now and July 16, 1947. As between the named parties there is no constitutional question to be decided and the question need not be decided. State, ex rel. Clarke, v. Cook, Auditor, 103 O. S., 465; Rucker v. State, 119 O. S., 189, and Wiggins v. Babbitt, 130 O. S., 240. However, since plaintiffs allege that they bring this suit on behalf of all other policyholders, we add that for the reasons given under subdivision II of this opinion, it is our opinion that Sec. 9364-8, G. C., is not violative of either of the Constitutions as alleged.

It is the opinion of the court, therefore, that the fourth amended petition be dismissed and judgment entered for the defendants.

Motion for new trial, if filed, may be overruled.

APPENDIX C.

Sec. 9364-1. **Conversion of domestic stock life insurance corporation into a mutual life insurance corporation; plan; "policyholder" defined.**

Any domestic stock life insurance corporation, duly incorporated under a general law, may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock, provided, however, that such plan: (1) shall have been adopted by a vote of a majority of the directors of such corporation; (2) shall have been approved by a vote of stockholders representing a majority of the capital stock then outstanding at a meeting of stockholders called for the purpose; (3) shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting; the term "policyholder" as used herein shall be deemed to mean the person insured under an individual policy of life insurance, and the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided: in the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons insured or the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof; in case any such

policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall have been filed at the principal office of the corporation at least thirty days prior to the date of said meeting, then such assignee shall be deemed a policyholder within the meaning hereof; except as provided herein, an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof; the reference herein to insurance in the amount of $1,000 or more shall be deemed to include any annuity contract, the commuted value of which is $1,000 or more on the date of said meeting, and any pure endowment contract for the principal sum of $1,000 or more; notice of such meeting shall be given by mailing such notice from the home office of such corporation at least thirty days prior to such meeting in a sealed envelope postage prepaid addressed to such policyholders at their last known post office addresses, provided, that personal delivery of such written notice to any policyholder evidenced by written receipt therefor may be in lieu of mailing the same, and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such mutualization plan; provided, however, that policyholders may vote in person, by proxy or by mail; that all votes shall be cast by ballot on a uniform ballot furnished by the corporation, and the superintendent of insurance shall supervise and direct the method and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the superintendent of insurance and to the corporation the result thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the superintend-

ent of insurance; that all necessary expenses incurred by the superintendent of insurance shall be paid by the corporation as certified to by him; and (4) shall have been submitted to the superintendent of insurance and shall have been approved by him in writing; provided that every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the superintendent, and provided that neither such plan, nor any such payment, shall be approved by the superintendent unless at the time of such approvals, respectively, the corporation, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, and in the case of any payment not fixed by such plan and subject to separate approval as aforesaid after the approval of such plan, after deducting also the amount of such payment, shall be possessed of assets sufficient to maintain its deposit theretofore made with the superintendent of insurance and not less than the entire liabilities of the corporation, including the net values of its outstanding contracts computed according to the standard adopted by the corporation under the provisions of section 636 of the General Code of Ohio, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated or paid under such plan.

(119 Ohio Laws 70; effective July 17, 1941)

Sec. 9364-2. **Acquisition of stock.**

If a stock life insurance corporation shall determine to become a mutual life insurance corporation, it may, in carrying out any plan to that end under the provisions of the preceding section, acquire any shares of its own stock by gift, bequest or purchase. Until all of such shares are acquired, any shares so acquired or acquired pursuant to the provisions hereinafter made concerning dissenting

stockholders shall be acquired in trust for the corporation as hereinafter provided and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote, until all of the capital stock of such corporation is acquired when the entire capital stock shall be retired and cancelled and thereupon, the corporation shall be and become a mutual life insurance corporation without capital stock.

(119 Ohio Laws 71; effective July 17, 1941)

Sec. 9364-2a. **Rights and privileges of dissenting stockholders.**

(This section is omitted.)

Sec. 9364-2b. **Appointment, qualification, bond, etc., of trustees; deposit by corporation retained by superintendent of insurance.**

The trustees provided for in section 9364-2 shall be appointed and vacancies shall be filled by the superintendent of insurance. Such trustees shall be duly qualified directors of the corporation at the time of such appointment and shall continue as such trustees until the purpose of this trust is accomplished or abandoned unless removed for cause by the superintendent of insurance. Said trustees shall file with the superintendent of insurance a duly verified acceptance of their appointment and declaration that they will faithfully discharge their duties as such trustees. Such trustees shall give and file with the superintendent of insurance bonds in such an amount as under the circumstances the superintendent of insurance deems just and proper with sureties thereon approved by the superintendent of insurance. All dividends and other sums received by said trustees on the shares of stock held by them shall be immediately repaid to said corporation. The necessary expenses of executing the trust shall be paid by the

corporation. All shares held by such trustees shall be deemed admitted assets of such corporation at their par value.

Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of such corporation. The deposit of one hundred thousand dollars in securities and/or mortgages made by such corporation pursuant to section 9364, General Code, shall be retained by the superintendent of insurance in trust for the benefit and security of all of the members and policyholders of such corporation.

(119 Ohio Laws 75; effective July 17, 1941)

Sec. 9364-3. **Officers and directors.**

When a stock life insurance corporation has become converted into a mutual life insurance corporation as herein provided, the officers and directors or trustees of the original corporation so converted shall remain as the officers and directors or trustees of the newly converted corporation until the next annual meeting for the election of officers and directors or trustees, when their successors shall be elected in the manner provided in the articles of incorporation and code of regulations by said corporation theretofore adopted.

(119 Ohio Laws 75; effective July 17, 1941)

Sec. 9364-4. **Corporate powers, how exercised.**

The corporate powers of a domestic mutual life insurance corporation shall be exercised by, and its business and affairs shall be under the control of, a board of directors or trustees composed of not less than three nor more than twenty-one natural persons who are policyholders or members and who are at least twenty-one years of age and at least three of whom are residents and citizens of this state.

(119 Ohio Laws 75; effective July 17, 1941)

Sec. 9364-5. **Term of directors or trustees.**

(This section is omitted.)

Sec. 9364-6. **Meetings of board.**

(This section is omitted.)

Sec. 9364-7. **Executive committees.**

(This section is omitted.)

Sec. 9364-8. **Code of regulations; contents; alteration, etc., of code.**

(a) The code of regulations of any such corporation shall provide that each policyholder of the corporation shall be a member of the corporation. The term policyholder as used herein shall be deemed to mean the person insured under an individual policy of life insurance, the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided. In the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof. In case any such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall be filed at the principal office of the corporation, then such assignee shall be deemed a policyholder within the meaning hereof, but for the purpose of determining voting rights such assignment shall not be effective until thirty days after it shall have been filed with the corporation. Except as provided herein an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof.

Such code of regulations shall provide that each policyholder insured in at least $1,000.00, or holder of an annuity, which at normal date of maturity requires the payment of $100.00 or more annually, and whose insurance or contract of annuity shall then be in force and which has been in force for at least one year prior to a policyholders' meeting, shall be entitled to one vote only irrespective of the number of policies or contracts held by him or the amount thereof.

(b) The power to make, alter, amend or repeal the code of regulations shall be vested in the board of directors or trustees unless reserved to the members by the articles of incorporation.

(c) The code of regulations of a mutual legal reserve life insurance corporation shall provide that such corporation shall issue no policy of life insurance or annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance or annuity.

(119 Ohio Laws 76; effective July 17, 1941)

APPENDIX D.

Sec. 12102-1. **Declaratory judgments, when granted, force and effect.**

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Sec. 12102-2. **(Construction and validity of instrument, etc., may be determined, when.)**

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Sec. 12102-3. **Contract.**

A contract may be construed either before or after there has been a breach thereof.

Sec. 12102-4. **Determination of rights or legal relations.**

(This section is omitted.)

Sec. 12102-5. **Powers not restricted.**

(This section is omitted.)

Sec. 12102-6. **Court may refuse judgment.**

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Sec. 12102-7. **Review.**

(This section is omitted.)

Sec. 12102-8. **Further relief based on declaratory judgment.**

(This section is omitted.)

Sec. 12102-9. **Determination of issues of fact.**

(This section is omitted.)

Sec. 12102-10. **Costs.**

(This section is omitted.)

Sec. 12102-11. **Declaratory relief; parties.**

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceed-

ing. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Sec. 12102-12. **Purpose of act.**

Sec. 12102-13. **"Person" defined.**

Sec. 12102-14. **(Independent sections.)**

Sec. 12102-15. **Interpretation of act.**

Sec. 12102-16. **(Title of act.)**

(These last five sections are omitted)

(Sections 12102-1 through 12102-16 comprise the act found in 115 Ohio Laws 495 to 497; effective October 10, 1933.)